91-1724 ①

Supreme Court, U.S.
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No.__________

In The
SUPREME COURT OF THE UNITED STATES
October Term 1991

IN RE: MEMORIAL ESTATES, INC.,
Debtor.

CHICAGO BANK OF COMMERCE,
Plaintiff,
v.

AMALGAMATED TRUST & SAVINGS
BANK, et al.,
Defendants.

CEMCO, INC. and WILLIAM L.
NEEDLER,
Petitioners.
v.

NORMAN B. NEWMAN and
CHICAGO BANK OF COMMERCE
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the federal courts, and in particular the bankruptcy court, have jurisdiction of this foreclosure case, removed from the state court at an advanced stage.

a. Whether the removal of this case from state court violated the United States Constitution, and whether 28 U.S. C., sec. 1478, or any other applicable removal statute by which this case was removed, is unconstitutional and null.

c. Whether there was a valid removal statute in force pursuant to which this case was removed to bankruptcy court, e. g. 28 U.S.C., sec. 1478.

d. Whether the removal of this case was properly perfected.

e. Whether all orders entered by federal courts must be vacated and the case remanded to state court.

II. Whether the bankruptcy court manifestly erred and abused its discretion when it fined Attorney Needler $1,000.00 for reiterating jurisdictional objections in the pleadings; and whether such conduct by the court is a denial of due process under Amendment V of the Constitution of the United States.

a. Whether the bankruptcy court is permitted to enter sanctions in a related case pursuant to Rule 9011.

b. Whether the bankruptcy court can enter a final order of sanctions in a related case in derogation of 28 U.S.C., sec. 157(c)(1); and whether there can be such a thing as a "core" sanction proceeding within a related case.

III. Whether this action is moot.

IV. Whether Cemco has standing or status in this action.

LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Cemco, Inc., the purchaser of certain of the assets of Memorial Estates, Inc. The address and phone number of Cemco, Inc. is 233 E. Wacker Drive, Suite 2707, Chicago, Ill. 60601; (312) 332-7111.

Another Petitioner is one of Cemco's Attorneys, William L. Needler. Mr. Needler's address is William L. Needler & Associates, Ltd., Suite 1300 , 8 South Michigan Avenue, Chicago, Illinois, 60603; phone 236-1118. Mr. Needler also represents himself and Cemco in this action.

Both Attorney Needler and Cemco, Inc. are also represented in this Court by James C. Truax, the record attorney. Mr. Truax's address and phone are: Law Offices of James C. Truax, 100 W. Monroe

Street, Suite 1200, Chicago, Illinois 60603; (312)-4244.

The Respondent is the trustee of the Memorial Estates, Inc. bankruptcy estate, Norman B. Newman. Mr. Newman's address is Much, Shelist, Freed, Dennenberg, Ament & Eiger, P.C., 200 N. LaSalle Street, Suite 2100, Chicago, IL 60601. Phone: (312) 346-3100.

An additional Respondent is The Chicago Bank of Commerce, n/k/a Associated Bank. The address and phone of the Bank are: 200 E. Randolph St. Chicago, Ill. 60601; Phone (312) 861-1000. The Bank is represented by George L. Grumley, Rudnick & Wolfe, 203 N. LaSalle Street, Suite 1800, Chicago, IL 60601. Phone: 368-4000.

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Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Cemco, Inc. and William L. Needler, its attorney, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above proceeding on December 30, 1991 (A. 95- 96).[1]

OPINIONS BELOW

The December 30, 1991 opinion of the Court of Appeals for the Seventh Circuit has not yet been published, but appears at A 1-22). A rehearing with suggestion for rehearing en banc was requested and the order denying same was entered on January 23, 1992 (A 97-98).

The District Court Opinion, rendered on September 1, 1988, on the main case is reported as In re Memorial Estates, Inc., 90 B.R. 886-910 (N.D. Ill. 1988).

Relevant excerpts from same appear here at A 23-51 (the full 45-page opinion being too voluminous to report here). The bankruptcy court did not issue an opinion but submitted findings of fact and conclusions of law. They are too voluminous to reproduce here, but suffice to say that those that were accepted are included in the District Court Findings of Fact and Conclusions of Law appearing at A. 34-51 and at 90 B.R. 906-910.

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[1] A stands for the Appendix to this Petition.

The district court issued an oral opinion on the sanctions issue which appears at A 64-82; and its order of November 7, 1989 appears at A 64. The bankruptcy court's Order on sanctions, entered June 6, 1989, appears at 93-95. There was no opinion beyond the order.

JURISDICTION

Bankruptcy Courts today derive their limited jurisdiction over a "related" case such as this under 28 U.S.C., sec. 157(a) by referral from the District Court. However, under sec. 157(c)(1), the bankruptcy court may only hear the case and issue findings of fact and conclusions of law in absence of consent of the parties (A 30-32). This procedure does not vary materially from that required under the Emergency Rule (Order of December 20, 1982. (A 10-11). The Emergency Rule contained no provision for removal of state court cases to the district court (or bankruptcy court). Hence, Cemco contends that there was no removal jurisdiction at the time this case was removed from state court, since the bankruptcy court's pervasive jurisdiction had been struck down in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858 (1982), and there was nothing to replace it.

The disallowed pervasive jurisdiction of the bankruptcy courts, Cemco contends, included direct removal of state court cases to bankruptcy court under 28 U.S.C., sec 1478(a) (A 9). Said another way, 28 U.S.C., sec. 1478(a) was rendered by implication unconstitutional by Marathon, and indeed it was "repealed" for that reason and replaced by 28 U.S.C., sec. 1452 (which gave removal jurisdiction to the district courts).

To the extent that there is jurisdiction in the federal courts, the district court derives its jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 1334 and its appeal jurisdiction from Section 158. The bankruptcy court, as aforesaid, gains jurisdiction by referral under Section 157.

The Court of Appeals gains its jurisdiction under Section 158.

This Court gains its jurisdiction under 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED

This case involves the constitutionality of 28 U.S.C., sec. 1478(a), which appears verbatim at A 109-110. Also involved are the scope and meaning of the following statutes which appear verbatim as indicated:

1. Emergency Rule, General Order of of the District Court, December 20, 1982, appears at A 98-103.

2. 28 U.S.C., sec 157 Procedures appears at A 103-107.

3. 28 U.S.C., sec. 1334 Bankruptcy cases and proceedings, appears at A 107-108.

4. 28 U.S.C., sec. 1471. Jurisdiction, appears at A 109.

5. 28 U.S.C., sec. 1452. Removal of claim related to bankruptcy cases, appears at A 110.

STATEMENT OF THE CASE

On July 19, 1983, the Bank filed this cemetery foreclosure proceeding in the Circuit Court of Cook County, Illonus, under Case No. 5786. The Bank was the owner of a promissory note (the "Note") made on May 17, 1978, in the original amount of $425,000. This Note was executed by Amalgamated Trust & Savings Bank ("Amalgamated") as trustee under a Land Trust Agreement dated

September 27, 1974, and known as Trust No. 2744. (District Court Finding 4, A 36). The Debtor, Memorial Estates, Inc. was the co-maker of the Note.

The Note was secured by a Trust Deed, also made on May 17, 1978 and executed by Amalgamated as land trustee. The Trust Deed names the Chicago Title and Trust Company as trustee, and the Trust Deed was properly recorded in the Cook County Recorder of Deeds Office on May 18, 1978 as Document No. 2444133. At the time of the execution of the Note and Trust Deed, the Debtor, Memorial Estates, Inc., was the sole beneficiary of Amalgamated Land Trust No. 2744.

Amalgamated, as land trustee , was the legal owner of the cemetery up until the foreclosure sale. (District Court Finding 5, A 37).

The Trust Deed provided that, to secure payment of the Note, Amalgamated as land trustee does "grant, remise, release, alien and convey" to the Bank, under the Trust Deed, the cemetery "premises" together with "all improvements, tenements, easements, fixtures, and appurtenances thereto belonging." As additional security for the Note the Bank also held an assignment of the beneficial interest in Amalgamated's Trust No. 2744 (District Court Finding 7, A 38).

On November 15, 1981, Memorial Estates conveyed to Cemco, Inc. by certificates of title numbers 9847 through 9911, all its interest in the "perpetual use and occupancy for exclusive burial rights", i.e. all of the unused, unsold lots in the cemetery, some 16,000 in number. (as demonstrated by the "Certificates of Title", Group Trial Exhibits No. 6; Savage, Tr. 1/21/86, p.33).

As consideration for the conveyance

of the burial spaces and beneficial interest to Cemco, Cemco agreed to assume, inter alia, consumer obligations of some $1.2 million (for future delivery of vaults, markers, etc. to some 3,000 consumers) (Savage, Tr. 1/21/86, p. 25-34), and to use its best efforts to obtain a release for Memorial Estates of its Trust Deed obligations. Cemco, Inc., contends that it has fulfilled this obligation by vigorously pursuing this lawsuit and by making every reasonable attempt to settle the case.

The District Court subsequently found that Cemco had never agreed to assume Memorial Estates' Trust Deed obligations (District Court Finding 9).

Cemco resisted the foreclosure, claiming, inter alia, (i) that an "unused burial space," i.e. a burial right, is not an interest in real property; (ii) that in any event, it is not an interest in real property which was covered by the bank's mortgage; (iii) that a burial right cannot be mortgaged under Illinois law; and (iv) that Cemco is a bona fide purchaser for value because the burial rights are not security under the Bank's trust deed (no other document prohibited the transfer to Cemco, and the Bank's failure to claim the proceeds of the sale of these burial rights was open and notorious).

There had been extensive proceedings in state court, at the conclusion of which that court entered an order on January 19, 1983, stating that it proposed to appoint a receiver on January 24, 1983.

On that day, Memorial Estates, Inc. filed to reorganize under Chapter 11 of the Bankruptcy Code. Three months later, on March 16, 1983, the Chapter 11 proceedings were converted to Chapter 7 liquidation proceedings and Lawrence M. Cooper was appointed Trustee in Bankruptcy on March 23, 1983. (Bankruptcy Court Docket and District Court Opinion, 90 B.R. 891). On April 13, 1983, Cooper removed this case directly to the bankruptcy court under the provisions of 18 U.S.C., sec. 1478(a). (Adversary Docket, p. 1) Cemco contends that this was not possible because the bankruptcy courts were divested of any such direct removal jurisdiction by Marathon, supra.

At this point, the Bankruptcy Amendments and Federal Judgeship Act had not been passed (eff. July 10, 1984) and the bankruptcy courts were operated under the Emergency Rule because their independent, pervasive jurisdiction had been abolished by Marathon, as noted infra. Nowhere in the Emergency Rule is there permission to remove a case from state court. (See A 98-103).

On February 1, 1984, Cemco filed its first Motion for Remand, it having become apparent that Plaintiff bank did not intend to seek remand but rather intended to continue on with the foreclosure proceeding before the bankruptcy court (See Adversary Docket, p. 5).

On February 8, 1984, the hearing on the trustee's application for removal was adjourned to successive dates and has never been heard to date (the latest date recorded on the Adversary Bankruptcy Court Docket for the adjourned hearing being July 11, 1989). (Adv. docket, p. 44). The reason for this no doubt lies in the fact that the trustee had never filed the pleadings with his application for removal as required by Bankruptcy Rule 9027. On February 7, 1984, the bankruptcy court, on its own motion, required the trustee to file and docket the pleadings and process in this case.

The trustee on that same day filed pleadings in state court proceeding 82 CH 3558 --a different case. (Adv. Docket, p. 8).

On May 29, 1984, the District Court denied Cemco's Motion to Withdraw the Reference and for remand and also dismissed Cemco's appeal of the bankruptcy court's order denying remand on the ground that a bankruptcy court's decision not to remand was not reviewable. 28 U.S.C., sec. 1478(b). (Dist. Doc., p.1).

The District Court, Judge Thomas R. McMillen, declared that the bankruptcy court (not the district court) had jurisdiction of this state law related proceeding under Section C(1) of the Emergency Rule of December 20, 1982, and specifically under Section D(3)(2) of that order. The constitutionality and jurisdictional propriety of these holdings was raised by Cemco but not addressed by Judge McMillen. (Dist. Ct.

Order of 5/29/84, D.C. Docket, p. 1).

The Emergency Rule (A 98-103) provided jurisdictional changes thought to cure the pervasive, unconstitutional jurisdiction of the bankruptcy court, and particularly its ability to rule in "related" cases. The Emergency Rule defined "related proceedings" to be "those proceedings that, in the absence of a petition in bankruptcy could be brought in state court." The bankruptcy court was required, then as now, to issue findings of fact and conclusions of law in related cases if a party did not consent to allow the bankruptcy court to rule. The Court of Appeals has declared this case to be a related case, and so has the District Court.

On June 14, 1984, Judge McMillen denied Cemco's Motion to Reconsider the May 29, 1984 order, and on June 22, 1984, Cemco filed its Notice of Appeal to the

Court of Appeals (No. 84-2064). (D. C. Docket, p. 2).

On July 10, 1984, the President signed the Bankruptcy Amendments and Federal Judgeship Act of 1984 into law, and *inter alia*, placed removal and remand powers in the district courts. 28 U.S.C. 1452. The Amendments also adopted with slight modification the "safeguards" or jurisdictional changes in the Emergency Rule that were supposed to cure bankruptcy court jurisdiction so that it could hear but not decide related cases.

On July 23, 1984, Cemco filed in district court an Emergency Motion to Withdraw the Reference for remand and other relief under new 28 U.S.C. sec. 1452 (which gave removal jurisdiction to the district courts, thus curing the unconstitutionality of direct removal to the bankruptcy courts).

On July 31, 1984, the Court of

Appeals authorized an extension of time to file Cemco's brief in Appeal No. 2064 (the issue of improper removal under 28 U.S.C., sec. 1478(a), pending disposition of the motion for remand under 28 U.S.C., sec. 1452 below.

On February 20, 1985, the Court of Appeals consolidated Appeal No. 2064 with Appeal No. 1196, which had been brought to challenge the certification of the appointment of the receiver by the bankruptcy court, thus taking jurisdiction of the removal issue.

However, on March 27, 1984, the Court of Appeals severed Appeal No. 84-2064 from the receivership appeal, so that the District Court could rule on Cemco's renewed motion for transfer and remand back to state court under 28 U.S.C., sec. 1452.

On May 20, 1985, shortly before leaving the bench, Judge McMillen issued a status order in which he claimed that he had "effectively decided" the jurisdictional issues on April 3, 1984, and that the bankruptcy court had jurisdiction pursuant to 28 U.S.C., sec. 157(c)(1). This could not be because 28 U.S.C., sec. 157(c)(1) was not then in existence on April 3, 1984. Nothing had been "effectively decided," certainly not Cemco's Emergency Motion. (Order on Status, May 20, 1985, D.C. docket, p. 7).

Cemco pressed Judge McMillen for a decision which was not forthcoming and shortly thereafter he retired.

On July 22, 1985, the bankruptcy court conducted a trial on the Bank's foreclosure action, and subsequently found against Cemco. However, it was not until August 14, 1986 that the bankruptcy court submitted findings of fact and conclusions of law to the District Court. The delay was not Cemco's fault, but resulted largely from the reversal by the District Court of the bankruptcy court's dismissal of Cemco's counterclaim and the necessity of an additional trial.

On July 31, 1986, the Court of Appeals affirmed the district court's appointment of a receiver in _In re Memorial Estates, Inc._, 797 F. 2d 516 (7th Cir. 1986). The Court had declared at oral argument that it appeared that Cemco's position was well taken and an equity receiver could not be appointed in a related case by a bankruptcy court. The Court changed its mind, but declared that issues of "surprising novelty" had been presented: "whether an order by a district judge appointing a receiver in a bankruptcy case is ever appealable even though not a final order . . . and whether the law ever allows the appointment of a receiver in a bankruptcy case." _In re Memorial Estates, Inc., Appeal of_

Cemco, Inc., 797 F. 2d 516, 517 (7th Cir. 1986). While The Court of Appeals carved out an exception, it noted at page 519: " . . . the Bankruptcy Code . . . states flatly, 'a court may not appoint a receiver in a case under this title.'

On July 16, 1986, Judge McMillen's successor, Judge Nordberg, denied Cemco's Motion for remand under Section 1452, and Cemco asked for reconsideration. Judge Nordberg did not address the jurisdictional issues, apparently because of Judge McMillen's erroneous pronouncement that he had decided them.

On October 5, 1987, Cemco filed its Notice of Appeal of Judge Nordberg's Orders under No. 27-2610, and the Court of Appeals consolidated that appeal with No. 84-2064 (both appeals challenging the improper removal and refusal to remand. At this point, the Court of Appeals declared the appeals to be interlocutory, but noted that the order denying remand could be appealed at the proper time if the motion for remand raised questions going to subject matter jurisdiction. In the Matter of Memorial Estates, Inc., 837 F. 2d 762 (7th Cir. 1988).

Where the bankruptcy court submits findings of fact and conclusions of law in a related case the standard of review is de novo, both as to the facts and the law. However, should a party consent to a ruling by the bankruptcy court, the burden is ordinarily "clearly erroneous" as to the facts and de novo as to the law on appeal. In an appeal of sanctions, however, the burden is abuse of discretion as to the facts and de novo as to the law. It has not been conclusively determined until recently whether an objection to the bankruptcy court's ruling in a related case is continuing, whether a litigant can give his consent on some matters and not others, and whether a litigant can waive his consent by not objecting when the bankruptcy court proposes to enter or does enter a final order. The Seventh Circuit has held that any such consent must be in writing as discussed infra.

Predicting the necessity of reiterating its jurisdictional objections every time the bankruptcy court attempted to rule and how that might prejudice the court, Cemco, Inc. early in the litigation, on July 30, 1984, presented a "Continuing Objection to Jurisdiction" to the bankruptcy court which was denied. Thereafter, in order to preserve its position, Cemco, Inc. felt it had to interpose its jurisdictional objections every time the bankruptcy court proposed to rule with final results in an important matter. This, no doubt, became frustrating to the bankruptcy court, as it did to Cemco.

On May 5, 1989, the bankruptcy court granted the FDIC's Motion to require the receiver to issue a second batch of deeds to consumers, and denied Cemco the right to respond either in writing or orally. At this point, ownership of the deeds had not been addressed by the Court of Appeals nor had foreclosure occurred, and Cemco, Inc. desired to exert some control over their issuance. None of the so-called "lot owners" which FDIC had financed had actually selected a lot. The "second batch" was some four hundred in number and there was no effort on the part of the court or the estate to ascertain the accuracy of FDIC's claims of customer ownership of lots.

The bankruptcy court had previously, in 1987, conveyed findings of fact and conclusions of law regarding the first batch of FDIC deeds to the district court after the FDIC had amended its motion to conform with some of Cemco's objections. The District Court conducted a de novo review and allowed the motion. However, the order was restricted to the particular deeds then involved.

On June 16, 1989, Cemco requested the bankruptcy court to reconsider and vacate its order issuing the second batch of deeds, claiming inter alia that it was unable to issue a final order in a related case. Judge Schwartz ordered Cemco's attorney to pay a $1,000 fine to the bankruptcy estate because Cemco had reiterated the same jurisdictional arguments in numerous other pleadings and therefore it deemed Cemco's Motion to be frivolous and improper.

Both the district court and the Court of Appeals affirmed this $1,000.00 fine, which Attorney Needler contends is unfair, erroneous and unconstitutional.

On September 1, 1988, the District Court had filed a Memorandum Order disposing of the main case. The District Court substantially rejected the bankruptcy court's findings and wrote its own. The District Court determined, inter alia, that the security interest held by the Bank attached to the unsold burial rights in the cemetery because they were easements. The District Court also held that Cemco had not assumed the mortgage (trust deed) on the cemetery. Additionally, the District Court held that burial rights should be conveyed to certain specific persons named by the FDIC pursuant to its amended motion to compel the issuance of deeds.

There were subsequent proceedings on foreclosure in the District Court that are not relevant here. Suffice to say, that various appeals to the Court of Appeals were filed and consolidated.

Cemco submitted its opening brief in the main case on July 12, 1989 and its Joint Supplemental Brief on March 18, 1990.

On May 17, 1991 the case was argued in the Court of Appeals and on December 30, 1991 that court affirmed the District Court. Cemco's motion for rehearing and suggestion for rehearing en banc was denied on January 23, 1992.

During the course of the bankruptcy proceedings, five "existing" (specific) motions for sanctions were lodged by the bank against Cemco and its attorneys. Only one of these existing motions was granted by the bankruptcy court. The court also granted "general sanctions".

The court's order awarded some $21,000.00 in sanctions and some $21,000.00 (as reasonable fees and costs for bringing the motion) to the estate and against Cemco, William L. Needler, its attorney, and Barnard A. Savage, Jr., Cemco's president, jointly and severally. The courts refused to consolidate the appeals of these sanctions.

The District Court has reversed and remanded Mr. Savage's appeal on the ground that there is no evidence to connect him with any of the sanctions.

However, counting the Plaintiff bank's cross appeal of the sanctions, there are three appeals below of the some 41,000.00 award. The legal issues raised here directly affect those appeals.

REASONS FOR GRANTING THE WRIT

I.

The Jurisdictional Issues

A.

Introduction

It should be understood at the outset that Cemco has nothing to do with the $1,000.00 sanction issue against Attorney Needler. Cemco was not held liable below and consequently does not argue here, nor has it argued below, in this matter. Cemco appears here on the jurisdictional issues in the main foreclosure case and Attorney Needler appears here on the sanctions issues.

B.

The Courts Below Did Not Have Jurisdiction of This Case and the Removal Of It From State Court Was Improper And Unconstitutional

On June 28, 1982, this Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, decided that the broad grant of jurisdiction of the bankruptcy courts to decided related cases under 28 U.S.C., sec. 1471 was unconstitutional. While there have been some subsequent efforts to limit the effects of this Court's rulings, there is no question that this Court struck down 28 U.S.C., sec. 1471(c), which vested the district court's bankruptcy jurisdiction in the bankruptcy courts. (See A 10).

This court will recall that it granted several extensions of time for Congress to pass remedial legislation, but it wasn't until July, 1984 that remedial legislation became effective to define the bankruptcy court's powers. Congress simply needed much more time to consider and afford a cure that would square with the Constitution.

Meanwhile, since their powers had been struck down, the bankruptcy courts operated on an Emergency Rule devised by an arm of this Court and adopted by the district courts. Just where the power for this occurs in the Constitution or laws of the United States has never been explained. It seems strange that Congress could not devolve the powers of the district courts on the bankruptcy courts, on the one hand, but that the district courts themselves could devolve such powers on the bankruptcy courts, on the other hand. To this, Cemco says nothing more than "necessity is the mother of invention."

When Congressman Don Edwards, the father of the 1984 legislation, reported H.R. 5174 (passed as the Bankruptcy Amendments and Federal Judgeship Act of 1984), he made the following comments among others (Cong. Rec. 6 /29/84, p. 7490; West, 1984 Bankruptcy Code Rules and Forms, "Highlights of Bankruptcy Amendments," p. VII-IX:

> In short, the Conference Report On H.R. 5174 undoes the court reform accomplished in 1978, makes the pre-jurisdictional system seem simple by comparison, and makes the job of the bankruptcy judge even less attractive than under the pre-1978 system. Finally, and very importantly, the jurisdictional powers granted to the bankruptcy judge and the methods of appointment are not free from constitutional doubt, which was what got us into this in the first place under the 1978 compromise.
>
> When H.R. 5174 becomes the law of the land, the Supreme Court will

have to confront the constitutionality of the course Congress has chosen to take, as it did not confront the interim rule which kept the courts operating after the stay of the Marathon decision expired. I am convinced that a decision in a case which we may call Marathon II, which I anticipate within a year or so, will confirm the original wisdom of the House of Representatives in 1978 and of the House Judiciary Committee in 1982 and 1983 in establishing a life-tenured bankruptcy court system. Nevertheless, the immediate crisis is at last resolved.

To date, there has been no such Marathon II.[2]

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[2] At the moment, there are two warring forces--those that are determined to win "life tenure" for bankruptcy judges and those opposed. The controversy, of course, is not about life tenure, as the many fine men, in the main, who serve as bankruptcy judges will always win reappointment if they want it.

It is contended that great judicial economies can be effected if only bankruptcy judges are allowed to have their way as Article III judges. Americans beware. It is not difficult to make the trains run on time, if one possesses absolute power.

As we may find out much sooner than later, the alteration of the bankruptcy

Suffice to say, that the plurality of this Court in Marathon held:

> Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state created rights as it does to adjudicate the rights it creates. Syllabus, citing p. 76-87 of Marathon Opinion.

The concurring justices agreed that the bankruptcy court's jurisdiction was too broad saying at 458 U.S. 91:

> All matters of fact and law in whatever domains of the law to which the parties dispute may lead are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner, the bankruptcy court is not an "adjunct" of either the district court or the court of appeals.

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laws may have fostered a situation where there is no protection for debtors without the consent of their creditors, and no protection for creditors whom the bankruptcy court does not favor (enforced by the threat and imposition of sanctions). It could be devastating during a period of economic downturn or financial calamity.

Thus, all of the bankruptcy court's jurisdiction under 1471 was struck down at least insofar as traditional contract-type claims arising under state law are concerned. It is to be noted that the Bank's foreclosure claim and Cemco's claim for grave spaces are traditional actions arising ex contractu under state law and therefore are related actions that cannot be resolved in the first instance by the bankruptcy court, subject only to appellate review by Article III courts.[3]

At bar, the Appellate Court and the district court have held that this case is related, and the parties agree that it is. It thus falls within Marathon.

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[3] Even were Thomas v. Union Carbide Agri. Prod. Co., 472 U.S. 568, 584 (1985) to restrict the scope of the Marathon decision, this case would fall within its scope, for Congress interpreted Marathon to mean that the bankruptcy court's entire related case jurisdiction was struck down and passed the appropriate remedial legislation suggested by Justice Burger in Marathon. This conclusion of Congress is entitled to respect. Marathon at p. 61.

When the related case jurisdiction of the bankruptcy courts fell, there was no longer any power to remove such cases from the state courts to the bankruptcy courts --for, as Justice Burger stated:

> The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court of which the bankruptcy court is adjunct.

There was no statute in force permitting direct removal of bankruptcy-related cases from state court to district court. The only statute on the books was 28 U.S. C., sec. 1478, which provided for the direct removal of state law claims to bankruptcy court, and was therefore unconstitutional for the reasons mentioned by Justice Burger.

There was no authority for removal in the interim Emergency Order, and such authority would have been clearly unconstitutional if it had been included in that Order.

Despite the fact that there was no valid removal statue in force, the Trustee in bankruptcy in this case removed these proceedings from state court directly to the bankruptcy court on April 13, 1983--after the Marathon decision was decided and before Congress passed the 1984 remedial laws. The removal is accordingly void. As Justice Burger had observed, the only way a bankruptcy court could properly get jurisdiction to hear, but not decide, a Marathon-type case was by referral from the District Court. At bar, the case was never removed to the district court so there could be no referral.

The District Court erroneously found that the case was removed under 28 U.S.C., sec 1452, which provides for direct removal to the district court. However, 28 U.S.C., sec. 1452 did not become effective until July 10, 1984 with the rest of the remedial laws, over a year after this case was removed. Hence this case was not removed pursuant to 28 U.S.C., sec. 1452.

The Court of Appeals has said that there is the likelihood that it assumed jurisdiction when it decided the appeal of the appointment of a receiver. (Ap. Op., A 7-8). That is entirely erroneous.

The Court of Appeals in In re Memorial Estates, 837. F. 2d 762 (7th Cir. 1988) stated that the jurisdictional challenge was interlocutory and not ripe for review, but could be raised later.

As that court very well knew, the Court of Appeals had severed by its order of March 27, 1985 (A 113-114) the jurisdictional appeal from the receivership appeal (having previously consolidated the actions).

A number of months elapsed while a remand to state court was sought in the district court pursuant to newly-enacted 28 U.S.C., sec. 1452. The departure of District Judge McMillen, then presiding judge, delayed matters, and in the meantime the bankruptcy court pressed forward with the case, thus staking out its claim to jurisdiction of the case.

The district court never did rule on the jurisdictional issues posed, apparently because of an erroneous comment by Judge McMillen in a status order of May 20, 1985 that he had "effectively decided" the jurisdicitonal issues on April 3, 1984 pursuant to 28 U.S.C., sec. 157(c)(1). Of course, that statute was not in effect on April 3, 1984 (its effective date being July 10, 1984), so nothing whatever had been decided (by implication or otherwise).

Accordingly, the "law of the case" was that the Court of Appeals had preserved the jurisdictional, constitutional challenge for an appeal on the merits. In any event, a challenge to subject matter jurisdiction may be raised at any time during the proceedings and is not foreclosed by "implicit" recognitions or assumptions of jurisdiction. As stated in Moore's Federal Practice, vol. 1, Jurisdiction, pt. 1, par. 0.60[4], p. 629:

> Even a party who invoked the federal court's jurisdiction is not estopped to raise lack of federal jurisdiction after a trial on the merits. A party, however, may consent to, or be estopped by his conduct[4] to raise lack of removal

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[4] This is the reason why Cemco had to reiterate time and time again its jurisdictional objections below in the pleadings (in the face of being denied a continuing objection)--to leave no doubt whatsoever that it was not waiving its position, and that is why it was so unfair, unjust and vindictive of the

jurisdiction where the removal action is within the federal court's original jurisdiction. American Fire & Casualty Co. v. Finn, 3412 U.S. 6, 17-18, 71 S. Ct. 534 95 L. ed. 702, 19 ALR 2d 738 (The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties).

At bar, there was no jurisdiction of related cases in the bankruptcy court, so that 28 U.S.C, sec. 1478(a) was invalid by its own terms. It provided that removal could occur only if "the bankruptcy courts have jurisdiction over such claim or cause of action."

Throughout his treatise, Professor Moore describes such removal statues as "removal jurisdiction" --e.g. "The

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bankruptcy court to fine Attorney Needler $1,000.00 for reiterating these objections.

Judicial Code of 1948 both enlarged and reduced removal jurisdiction" (emphasis supplied). Moore's Federal Practice, vol 7B, Judicial Code, par. 89-2,p.665. Clearly, removal statues are jurisdictional. As stated by Professor Moore, "The power in Congress to grant or withhold the right of removal is within its power to prescribe the jurisdiction of the inferior federal courts," (Emphasis supplied); Moore's Federal Practice, vol. 7B, Judicial Code, par. 89-3, p.660.

The federal courts cannot usurp the jurisdiction of state courts and invade their dockets without statutory and constitutional (jurisdictional) basis -- i.e. removal jurisdiction.

Amendment X to the Constitution provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There is no delegation of power to the United States to invade the jurisdiction of the state courts so as to remove cases well advanced toward trial, simply because a party has gone bankrupt. Needless to say, any litigation in which a bankrupt is a party may have an effect on the bankruptcy estate. The "administration of the bankruptcy estate" is something very different than the interests or corpus of the bankruptcy estate.

The expansive definitions of bankruptcy jurisdiction put forward by some and in this case constitute a grant of unlimited jurisdiction to the federal courts. This is not what the Constitution provides, nor is it the law.

This Court in Continental Bank v. Rock Island Railway, 294 U.S. 648, 669, 55 S. Ct. 595, 79 L.Ed. 110 (1934) declared:

> "while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the constitution was adopted, it does not follow that the power has no limitations . . . ."

The Continental Court held that the nature and extent of the bankruptcy power is best determined by a gradual process of historical and judicial "inclusion and exclusion." The laws passed in 1978 did not envision a gradual process of historical and judicial "inclusion and exclusion." They sought to create a revolution. They did this with all of the consequent chaos and uncertainty that could be expected from such a change. Suffice to say, as matters presently stand, the bankruptcy courts have been given far more power than any court of the United States. They may do anything they like and coerce their will on attorneys and parties who appear before them by way of sanctions, subject only to an accelerated appeal to a busy district court which has little or no time to hear such matters and in which the factual burden is "clearly erroneous" on the merits and abuse of discretion on the sanctions.

To summarize, Section 1478(a), which provided for direct removal of state court cases directly to the bankruptcy court, was unconstitutional for all the reasons stated in Marathon. Such was an unauthorized usurpation of the Article III jurisdiction of the district courts. Because there was no valid act of Congress permitting removal of state court actions to district courts under the bankruptcy powers, this case could not be removed.

There was a total lack of subject matter jurisdiction in the federal courts when this case was removed, and particularly in the bankruptcy court. So far, the courts below have avoided facing this issue by misstating the facts or by applying non-existent law.

The court of appeals avoids the issue of removal jurisdiction by ignoring it and pretending (albeit erroneously) that once subject matter jurisdiction is assumed "by implication", the law of the case prevents any challenge; or, alternatively, that somehow the Emergency rule affords jurisdiction. There is no removal jurisdiction afforded by the Emergency Rule. (See A 98 et seq.).

Such unfortunate attempts as these should persuade this Court to grant Cemco's Petition, for they are visible precedent for the very thing so criticized by members of this Court and by the present administration. How can one condemn a prior propensity of the courts to twist law and fact to achieve liberal ends, when law and fact are twisted to achieve the ends suggested by large banks, who desire to leave customers owed grave stones holding the bag, or suggested by forces who insist on pervasive and absolute power in the bankruptcy courts? Cemco suggests that such expansive powers are unwise and not consonant with the ideals of fairness and justice that are at the core of American jurisprudence.

C.

The Removal Of This Case Was Not Properly Perfected

To date, there have been no schedules filed in the underlying bankruptcy case and there has never been an adjudication as to whether the cemetery was property of the estate prior to foreclosure and sale.

That aside, the trustee's application for removal was never heard (see pages 11-12 supra), the necessary pleadings from state court were never filed in this case as required by Bankruptcy Rule 9027(a)(1)[5] and therefore the removal was void in any event.

II.

The Sanction Issues

A.

The Bankruptcy Court Lacked The Jurisdiction and Authority To Fine Attorney Needler $1,000.00

The background leading up to the sanctions is illuminating.

On March 10, 1989, the Bankruptcy Court first attempted on its own motion to sanction Cemco's attorney, William L. Needler, by fining him $500.00, ostensibly for attempting to object by letter to the fee application of George Shapen, the receiver of the cemetery. According to the bankruptcy court, this was unauthorized by the rules. The fine bore no relationship to any costs or expenses suffered by any party and was entirely invented by the bankruptcy court.

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[5] That is if a rule setting forth the means and conditions whereby removal direct to the bankruptcy court could be said to have any validity whatsoever.

Suffice to say, that the Bankruptcy Court vacated its order when it was discovered that the offending letter was in response to another letter by the receiver addressed to the bankruptcy court in regard to his fees. The bankruptcy court excused this adventure by saying that it wanted to get Attorney Needler's attention.

On June 6, 1989, the bankruptcy court, again on its own motion, fined Attorney Needler $1,000.00 for objecting to the bankruptcy judge entering an order allowing the receiver to issue another batch of deeds to FDIC customers. Cemco's motion appears at A 82-93, and the Court's order at A 93-94).

On June 26, 1989, the bankruptcy

court entered an order and a supporting memorandum which has imposed sanctions upon Cemco, Needler (its attorney) and Barnard Savage Jr. (Cemco's President) in the amount of $42,423.00 (including fees for bringing the motion) and also denied Cemco's cross motions for sanctions.

Petitioners vigorously dispute any wrongdoing of any kind. The District Court has vacated the bankruptcy court's judgment against Mr. Savage and remanded for evidence, if any, of any involvement by Savage in the alleged sanctionable activity.

There is, however, no sanctionable activity which is the reason why Judge Schwartz awarded "general sanctions". According to Judge Schwartz, "general sanctions" relieve the court of saying what they are -- so it's anybody's guess. The $42,423.00 sanctions are before four different courts below. Needler's appeal is before the Court of Appeals. Cemco's appeal and the bank's cross appeal are before two different District Courts and Mr. Savage is still before the bankruptcy court.

The common legal issue in all of these sanction appeals is whether the bankruptcy court in this "related" foreclosure case, removed from state court at an advanced stage, can impose sanctions pursuant to either 28 U.S.C., sec. 1927 or Bankruptcy Rule 9011.

This Court should settle the question in the only way possible-- by declaring that the bankruptcy court is powerless to enter an order of sanctions in a related case.

The District Court, the Hon. Judge Milton I. Shadur, found it unlikely that the bankruptcy court could issue sanctions under Section 1927 because the bankruptcy court is not a Court of the

United States as specified therein. A bankruptcy court may not impose sanctions under 28 U.S.C., sec. 1927 because it is not a "court of the United States" as is required under that law. Matter of Richardson (U.S. v. Jenkins), 52 B.R. 527, 531-2 (W.D. MO., 1985); In re Sequoia Auto Brokers Ltd., Inc., 827 F, 2d 1281, 1287-88 (9th Cir. 1987).[6] However, Judge Shadur found it unnecessary to rule on this, as did the Court of Appeals, because it was clear to him that sanctions in themselves are a separate "core proceeding", thus expanding the stated scope of Bankruptcy Rule 9011.

Bankruptcy Rule 9011 states:

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[6] While an argument could be made that bankruptcy courts were courts of the United States after 1978 and up to Marathon, all doubt was removed when Congress repealed Pub. L. 95-598, sec 213, 92 Stat. 2549, 2661 (1978 Act) by the 1984 Amendments. Pub. L. No 98-353, sec. 113, 98 Stat. 333, 343. Bankruptcy courts became adjuncts as before.

> Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by attorney . . . shall be signed by at least one attorney of record . . . . The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass, to cause delay or to increase the cost of litigation. . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document including a reasonable attorney's fee. (Emphasis supplied)

Clearly, the signed papers in this case were not served or filed in a case under the Code. They were first filed in a case in state court which was improperly removed directly to bankruptcy court and became a related adversary proceeding. Hence, at best, all the bankruptcy court was empowered to do was issue findings of fact and conclusions of law to the district court as required by the Emergency Rule and 28 U.S.C., sec. 157.

To avoid the obvious, the District Court has declared that sanctions are a "core proceeding" on the theory that they affect the administration and liquidation of the estate. This erroneous idea is defective on two grounds.

First, Section 157 defines what a "core proceeding" is and be assured sanctions in a related case are not core proceedings. A core proceeding is one which arises under title 11, or arises in a case under title 11. Section 157(b)(1). (See A 104). The sanctions here do not arise under title 11 nor do they arise in a case under title 11. If at all, they arise in a case related to title 11 proceedings.

And, while the sanctions may affect how much the estate may get, or involve conduct which indirectly may cause unwarranted expense, they still are not matters concerning the administration or liquidation of the estate or any of the other listed situations in 157(b)(2). Based on this theory there is nothing of which the bankruptcy court does not have jurisdiction as long as it touches the debtor, however indirectly.

Second, Section 157(c)(1) requires the district court, and not the bankruptcy court to issue any final order in a related case. The sanction order, by its own terms, is a final order entered in a related case, and hence there is no authority in the bankruptcy court to make a final determination.

The inspiration for sanctions as a core proceeding obviously arises from In re Sequoia, supra. In that case, the government argued that because the contempt issue (power to fine or imprison for civil contempt) arose in a "core" involuntary bankruptcy proceeding that the bankruptcy court had civil contempt power. The 9th Circuit rejected this theory saying that it was "not persuaded" that in giving bankruptcy judges authority over core proceedings Congress also gave them contempt power in those proceedings." 827 F. 2d at 1289.

Sanctions, of course, are a variety of the power to fine for contempt, and sanctions are not core proceedings for all of the reasons stated in Sequoia. However, the situation at bar is not even close to Sequoia. Unlike Sequoia, this is not a case where the sanctions arose in a "core proceeding". This is a related proceeding and has been held to be so by the bankruptcy court, the District Court and the Court of Appeals.

It is the law of the case. In re Memorial estates, Inc., 797 F. 2d 516, 518 (7th Cir. 1989) and In re Memorial Estates, Inc. (Chgo Bank of Commerce v. Amalgamted trust & Savings Bank), 90 B.R. 886, 891 (N.D. Ill).

As stated in Richardson and Sequoia, supra, the bankruptcy court has no inherent power to fine or sanction. 827 F. 2d at 1284. The bankruptcy courts have the power to sanction only if they have a statutory basis for that power. There is no statutory basis whatever for the bankruptcy courts to sanction, especially in a related case.

It is questionable whether this Court should be making bankruptcy rules allowing imposition of sanctions by bankruptcy courts, since only Congress apparently has the power to legislate in this area.

But be that as it may the only

quasi-statutory basis for exercise of the power to sanction by bankruptcy courts is Bankruptcy Rule 9011, and that Rule is expressly limited by its terms to "a case under the Code."

It is important for this Court to rule in this matter before the particularly erroneous theory that sanctions are a core proceeding gains currency. For all of the reasons stated in Marathon, it would be unconstitutional to extend the bankruptcy court's powers so far as to sanction litigants in related cases by direct and final order subject only to appeal under 28 U.S.C., sec. 158. Indeed, to do so violates the specific laws laid down by Congress, as above demonstrated, and therefore deprives Attorney Needler here, and other litigants in related cases, of the due process they are guaranteed by Marathon. Amendment V, U.S. Constitution. The matter is urgent and compelling.

B.

Irrespective, Attorney Needler Was Not Guilty of Sanctionable Conduct

28 U.S.C., sec. 157 (c)(2) provides that the parties by consent may convey jurisdiction to the bankruptcy court to decide related matters. If they do this, however, they lose their right to a de novo review in the District Court.

There is no attorney who, vigorously representing his client, would waive such a review unless there were some minor matter of no consequence which could be agreed to without waiving the right to de novo review entirely.

But there was no way of knowing just how and under what circumstances a litigant might waive its right to de novo review until the Seventh Circuit in Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F. 2d 746 (7th Cir. 1989), held that in a related cases, such as this, a litigant could not waive the limitations on the bankruptcy court's jurisdiction except in writing. Still undetermined, however, is whether if one waives the jurisdictional limitation in one matter, the ability to insist on limited jurisdiction may be preserved for another matter.

Hence, Attorney Needler did the right thing, and it is what any competent attorney would be obliged to do for his client, when he reiterated those jurisdictional objections every time the bankruptcy court proposed to usurp the District Court's authority and issue a final order in this related case.

The issuance of grave spaces to customers of the FDIC was not a mere "housekeeping" function as the bankruptcy court contended. It was adjudicating the case and disposing of grave spaces which Cemco claimed belonged to it. Not even the FDIC believed the bankruptcy court's expansive ideas of jurisdiction, for when it understood its mistake in securing an order from Judge Schwartz on the second batch of deeds, it arranged to have the District Court approve Judge Schwartz's order.

As stated in Cemco's Motion to Reconsider Order of May 5, 1989 Granting FDIC Motion to Compel Issuance of Deeds (A 82-93), the bankruptcy court refused to allow Cemco to file any response to FDIC's motion when it was presented on April 28, 1989 (Tr. 4/28/89, p. 4-5). Cemco's Motion to Reconsider was its first opportunity to object to the issuance of hundreds of deeds on nothing more than the FDIC's say-so. It was not unreasonable to request an opportunity to check out the hundreds of contracts supplied by the FDIC as the basis for issuing deeds to specific customers. After all, that was allowed the first time around, and Cemco found persons who were not owed deeds and other mistakes. Also, the first time around, the bankruptcy court issued findings of facts and conclusions of law and did not issue a final order.

Incredibly, the bankruptcy court sanctioned Attorney Needler $1,000 for reiterating Cemco's jurisdictional objection in Cemco's Motion to Reconsider, but, more incredibly, the award has been affirmed by both the District Court and the Court of Appeals.

Attorney Needler did nothing more than insist that the bankruptcy court follow the law.

Of course, the District Court didn't bother to understand the merits of the matter, since it did not allow the briefing and oral argument which would have provided the required illumination. It claimed it could rule "on the record" presented.

The Court of Appeals Opinion does not face the merits squarely. That court said at A 22:

> In any event, the district court considered the merits of the sanction and found it reasonable and proper.

The District Court similarly vaporously stated at A 79:

a 79:

> Now . . . only the merits of the imposition of sanctions remain. And in all candor, nothing is really offered to suggest that Judge Schwartz's substantive determination was not entirely reasonable and proper. And indeed I do find that it was, and I find there was ample basis for Judge Schwartz to have ruled as he did. And accordingly I affirm the imposition of sanctions by Judge Schwartz in the cases before me.

Needless to say, "nothing was offered" because the matter was decided summarily without permitting the parties to offer anything.

There was no basis at all for the

bankruptcy court's imposition of sanctions, and no basis for their affirmance by the District Court and the Court of Appeals.

III.

It Is Untrue That This Action Is Moot

As an easy way out, the bank has attempted to "moot" this action in the Court of Appeals. It shouldn't work for two reasons:

1. Cemco had reason to believe that the sale of the cemetery to "an innocent third party" was not at arm's length. Cemco moved for discovery which was denied. The Court of Appeals reserved the mootness issue for final decision, but stated that the Bank could not refer to any "collateral documents" in its arguments. (See Order, A 111-112). The Bank could only establish a sale of the cemetery with collateral documents(e.g. the bill of sale, deed, etc.), so the

issue should have been ignored.

2. When the Court of Appeals denied discovery, it could not take notice of the sale of the cemetery--since due process requires an opportunity for discovery and hearing.

It is still Cemco's information and belief that the Bank would be hard-pressed to establish a sale to an "innocent" third party.

IV.

It Is Untrue Cemco Had No Status

The Court of Appeals erroneously infers that Cemco intervened to protect its burial rights after the Trustee removed the case to bankruptcy court. (A 2). The fact is, however, that the Bank sued Cemco in state court, and Cemco was dragged into bankruptcy court against its will.

Cemco has always been a defendant in these proceedings with all the due process and legal rights afforded to such a party. It was sued to void its beneficial interest and to establish that it did not own the burial rights in face of the Bank's Trust Deed. Cemco is also a small creditor, and potentially large creditor, of the estate, and has status on that ground, as well. Since this matter was not raised, or was ignored, in the bankruptcy and District Courts, it was a surprise that the Court of Appeals would attempt to rule on that basis.

Since there have been no bankruptcy proceedings under the Code below over these nine years last past, e. g. no schedules and no bar dates, it is truly amazing that an such argument could be advanced. Cemco tried to have the bankruptcy proceedings take place first so that the status and rights of the parties could be defined, but to no avail.

CONCLUSION

Petitioner Cemco requests this Court to hear and grant its petition for writ of certiorari to the Seventh Circuit, to reverse and vacate the judgments below, to order this case remanded to the Circuit Court of Cook County, Illinois from where it was improperly removed.

Petitioner Needler requests this Court to vacate the sanctions in the amount of $1,000.00 against him and permit him to go without further day.

Both Petitioners request whatever other relief is equitable and just.

Respectfully submitted,

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In The
United States Court of Appeals
For the Seventh Circuit

Nos. 88-2939, 89-2803, 89-2879
89-3586, 89-3601, 89-365,
90-1053 & 90-1089

IN THE MATTER OF:
MEMORIAL ESTATES, INCORPORATED,
DEBTOR.
APPEAL OF: CEMCO, INCORPORATED AND
WILLIAM L. NEEDLER.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 85 C 3520, 85 C 8786, 8 C 7780,
87 C 3829, 89 C 3719 & 89 C 5833
John A. Nordberg, Judge
Milton I. Shadur, Judge

ARGUED MAY 17, 1991
DECIDED DEC. 30, 1991

Before COFFEY, MANION and KANNE,
Circuit Judges

KANNE, Circuit Judge. Chicago Bank of Commerce n/k/a Associated Bank ("Bank") sought to foreclose on a trust deed held on cemetery property after the mortgagor, Memorial Estates, Inc., defaulted on the loan secured by the mortgage. The foreclosure action was filed in an Illinois state court but was removed to the bankruptcy court when Memorial Estates declared bankruptcy. After an evidentiary hearing, the bankruptcy court recommended to the district court that an equity receiver be appointed to operate the cemetery while the foreclosure action was pending pursuant to 28 U.S.C., sec. 157(c)(1). After a de novo review, the district judge certified the appointment of a receiver.[1] Cemco, Inc. to whom Memorial Estates had assigned its rights to the unused burial plots in the cemetery (without the Bank's approval) intervened and later appealed. We upheld the appointment. In re Memorial Estates, Inc., 797 F. 2d 516 (7th Cir. 1986).

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[1] In considering the appointment of a receiver by the district court we stated, "The bankruptcy judge himself could not appoint the receiver, because the foreclosure suit was collateral to the bankruptcy--a "related" rather than "core" bankruptcy case-- so that the actual rulings had to be made by the district judge, with the bankruptcy judge's role being advisory. See 28 U.S.C., sec. 157 (c)(1)." In re Memorial Estates, Inc., 797 F.2d 516, 518 (7th Cir. 1986).

While also contesting the bankruptcy court's jurisdiction to hear the foreclosure proceeding,[2] Cemco argued that the rights to the unused burial plots were not covered by the trust deed. After trial on the foreclosure action and Cemco's counterclaims, the bankruptcy court submitted several sets of findings of fact and conclusions of law regarding the separate issues to the district court pursuant to Section 157(c)(1). The bankruptcy court proposed that the rights to the unused burial plots were covered by the mortgage, that Cemco was not a bona fide purchaser of the rights, the Bank was entitled to foreclose on the trust deed, and that Cemco's counterclaims had no merit.

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[2] Cemco's previous attempts to have the foreclosure proceeding remanded to the state court were unsuccessful. See In re Memorial Estates, Inc., 837 F. 2d 762 (7th Cir. 1988).

After a de novo review in which the parties clarified the record and submitted additional evidence, the district court denied Cemco's motion to strike the bankruptcy court's proposed findings and conclusions and affirmed the bankruptcy judge's refusal to recuse himself for bias. In considering Cemco's specific objections to the proposed findings and conclusions, the district court determined that the rights to the unused burial plots were easements expressly covered by the trust deed and that the Bank was entitled to foreclose on the cemetery property. The court also found that Cemco had actual knowledge of the mortgage before it acquired the rights to the plots and therefore was not a bona fide purchaser. The court determined that Cemco did not assume the mortgage and thus was not liable for a deficiency or for attorney's fees and costs provided by the deed. The case was referred back to the bankruptcy court for further findings and conclusions as to attorney fees and costs to be awarded against Memorial Estates.

Meanwhile, the Federal Deposit Insurance Corporation ("FDIC") moved for an order in bankruptcy court directing the receiver to issue deeds for burial plots to certain individual purchasers. The FDIC acquired the right to receive payments due under retail installment contracts with consumers for the purchase of burial rights to plots from the sole shareholder of the cemetery. The bankruptcy court granted the FDIC's motion to compel the issuance of the deeds and the district court ordered their issuance.

The district court conducted a de

novo review of the bankruptcy court's fee recommendation and adopted it with slight modification. The court ordered a foreclosure and sale of the cemetery property. The judgment provided that if the proceeds of the sale were insufficient to satisfy Memorial Estates' debt to the Bank plus costs the Bank would be entitled to a deficiency judgment and that Memorial Estates would be entitled to any surplus. Cemco's appeal and motion for stay pending appeal were denied by the district court. Cemco also filed an emergency motion for stay with this Court which we denied. The Bank was the only bidder on the property at the public auction. The district court approved and confirmed the sale to the Bank, which later sold the property.

Cemco appeals the subject matter jurisdiction of the federal courts to hear the foreclosure action. In In re

Memorial Estates, Inc., 797 F. 2d at 518, we noted that the foreclosure suit was a "related" rather than "core" bankruptcy case, and therefore the actual rulings had to be made by the district court with the bankruptcy judge's role being advisory.[3] Our decision in that opinion, that the district court had jurisdiction to appoint an equity receiver upon the bankruptcy court's recommendation, implicitly recognized that those courts had jurisdiction over the underlying foreclosure action. "[O]nce an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." See Key v. Sullivan, 925 F. 2d at 1056, 1060 (7th Cir. 1991). Therefore, the law of the case indicates that the bankruptcy court and the district court had subject matter jurisdiction to hear the foreclosure action.[4]

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[3] Cemco argues that the foreclosure action is not "related" to the bankruptcy because there has been no determination that the cemetery is part of Memorial Estates' bankruptcy estate (no schedules have been filed) and because the proceeding is purely a question of state law. While the foreclosure action concerns state law, the proceeding affects the bankruptcy estate because the cemetery was Memorial Estates" principal asset and is therefore "related." See infra.

Nevertheless, even if there is no law of the case regarding subject matter jurisdiction, the federal courts had jurisdiction to hear the foreclosure proceeding.

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[4] Cemco argues that there is no law of the case with regard to subject matter jurisdiction because the issue has not been previously determined. See Key v. Sullivan, 925 F. 2d at 1061. Cemco contends that our holding in In re Memorial Estates, Inc., 837 F. 2d 72 (7th Cir. 1988), that the bankruptcy court's order denying Cemco's motion to withdraw the foreclosure proceeding from that court was interlocutory and not appealable, indicates that its jurisdictional challenge was preserved for appeal on the merits. Accordingly, Cemco maintains that the only law of the case is that this court preserved its jurisdictional appeal for a hearing on the merits. The argument confuses separate proceedings and has no merit.

The foreclosure action was removed by Memorial Estates' bankruptcy trustee to the bankruptcy court pursuant to 28 U.S.C., sec 1478(a).[5] The removal occurred after the Supreme Court struck down 28 U.S.C., sec 1471(c), which vested the district court's bankruptcy jurisdiction in bankruptcy courts, as a violation of Article III in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct.

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[5] 28 U.S.C., sec 1478(a) has been repealed. That section allowed a cause of action in a civil action to be removed to the bankruptcy court for the district where the civil action was pending if the bankruptcy court had jurisdiction over the cause of action. Removal is presently covered by 28 U.S.C., secs. 1334, 1452(a)

2858 (1982),[6] but before the Bankruptcy Amendments and Federal Judgeship Act of 1984 became effective. To provide for the continuing operation of the bankruptcy systems, the United States District Court for the Northern District of Illinois adopted a General Order (the Emergency Rule) on December 20, 1982. See Moody v. Amoco Oil Co., 734 F. 2d 1200, 1208 (7th Cir.), cert. denied, 469 U.S. 982, 105 S. Ct.386 (1984); White Motor Corp. v. Citibank, N.A., 704 F. 2d 254 (6th Cir. 1983).

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[6] We agree with the district court's finding that Cemco's argument that Northern Pipeline prohibits bankruptcy courts from hearing related cases has no merit. Northern Pipeline "establishes only that Congress may not vest in a non-Article III Court the power to adjudicate, render final judgement, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 584, 105 S. Ct. 3325. 3334 (1985).

The Emergency Rule provided that all cases under Title 11 [the Bankruptcy Code] and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to bankruptcy judges. Section C(1). "Related" proceedings were defined as civil proceedings that, in the absence of a bankruptcy petition, could have been brought in a district court or a state court. Section D(3)(a). In such proceedings, bankruptcy courts were to submit findings, conclusions and proposed orders of the district court, and could only enter final orders if the parties consented. Section D(3)(b). The district court would then review the findings, conclusions and proposed orders de novo and enter appropriate orders. Section E(2).

A case is "related" to a bankruptcy when the dispute "affects the amount of property for distribution [i.e., the debtor's estate or the allocation of property among creditors." In re Xonics, Inc., 813 F. 2d 127, 131 (7th Cir. 1987); see also Diamond Mortg. Corp. of Illinois v. Sugar, 913 F. 2d 1233, 1239 (7th Cir. 1990) (suit is related if it has direct and substantial impact on asset pool available for distribution to creditors), cert. denied, ____U.S.____, 111 S. Ct. 968 (1991). Considering that the cemetery was the principal asset of Memorial Estates and that the district court's order of foreclosure and sole of the property provided that Memorial Estates was liable to the Bank for any deficiency after the sale and that Memorial Estates would be entitled to any surplus, it is clear that the foreclosure would have affected Memorial Estates' bankruptcy estate and that the proceeding was therefore "related." Under the

Emergency Rule, the bankruptcy court had jurisdiction to hear the "related foreclosure proceeding and submit findings and conclusions to the district court and the district court had jurisdiction to review those findings and conclusions de novo and enter a final order.[7]

Cemco also appeals several orders of the district court regarding the rights to the unused burial plots. However, those appeals are moot because the Bank sold the cemetery to a bona fide purchaser during the pendency of this appeal.[8] It is well settled that "'[i]f an event occurs while an appeal is pending that renders it impossible for an appellate court to grant any relief or renders a decision unnecessary, the appeal will be dismissed as moot.'" Federal Deposit Ins. Corp. v. Meyer, 781 F. 2d 1260, 1264 (7th Cir. 1986) (quoting Fink v. Continental Foundry & Machinery Co., 240 F. 2d 369 374 (7th Cir.), cert. denied, 354 U.S. 938, 77 S. Ct. 1410 (1957)).

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[7] Federal district courts also had jurisdiction over "related" cases after Northern Pipeline pursuant to 28 U.S.C., sacs. 1471(a), (b) (presently 28 U.S.C., sacs. 1334(a) and (b). See In re Salem Mort. Co., 783 F. 2d 626, 632 (6th Cir. 1986). Both the bankruptcy court and the district court would now have jurisdiction to hear the "related action pursuant to 28 U.S.C., sec. 157(c)(1).

Cemco unsuccessfully sought a stay of the enforcement of the district court's order of foreclosure and sale of the property in the district court and in this court and failed to post supersedeas bond to stay the sale. See FED. R. CIV.

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[8] Cemco's arguments that the sale was not at arms length and is not bona fide and that the special warranty deed conveyed by the Bank to the purchaser is invalid to transfer title to the property are unsupported and have no merit.

P. 62(d). In the absence of a stay, the sale of the property to a bona fide purchaser by the Bank during the appeal moots the appeal of the judgment ordering the sale. Meyer, 781 F. 2d 1263; In re Vetter Corp., 724 F. 2d 5 2, 55 (7th Cir. 1983). Therefore, any arguments Cemco makes with regard to the property are moot. See In re Sax, 796 F. 2d 994, 998 (7th Cir. 1986) (whether bankruptcy court had jurisdiction to order and approve sale of property where it was alleged property was not part of debtor's estate was not considered on mootness grounds after sale of property); Meyer, 781 F. 2d at 1264-65 (appeal of amount due under note was mooted by sale of property during pendency of appeal).

Cemco argues that the absence of a designated record precluded a de novo review of particular issues by the district court, i.e. whether Cemco assumed the mortgage and whether Cemco had a right to possession and ownership of the cemetery books and records.[9] Cemco acknowledges that at a hearing on these issues the parties clarified the record and submitted additional evidence. In adopting the bankruptcy court's findings and conclusions, the district court stated it had conducted "a de novo review of the bankruptcy court record including the exhibits, and in particular the record of the trial of the Bank's foreclosure, and Cemco's counterclaims, and the evidence submitted." Cemco has not pointed to any evidence which was not before the district court or any prejudice it has suffered.

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[9] We note that the district court determined that Cemco did not assume the mortgage and that whether Cemco was entitled to possession and ownership of the cemetery books and records was irrelevant to the foreclosure proceeding.

Cemco contests the district court's awards of attorney's fees and receiver's fees and the court's order of a sixty-day redemption period after the sale of the property. However, we cannot address the merits of these arguments because Cemco lacks standing to raise them. With regard to attorney's fees and receiver's fees, the district court specifically found that Cemco did not assume the mortgage. Therefore, Cemco is not liable to the Bank for any fees and costs provided by the deed and thus suffers no actual or threatened injury from the district court's award. See Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984) (to have standing a party must allege a personal injury); Phillips petroleum Co. v. Shutts, 472 U.S. 797, 804, 105 S. Ct. 2965, 2970 (1985) (federal standing requires an allegation of personal stake in the outcome of the controversy; a litigant must assert his own legal interests rather than those of a third party), cert. denied, 487 U.S. 1223, 108 S. Ct. 2883 (1988); Frank Rosenberg, Inc v. Tazewell County, 882 F. 2d 1165, 1168 (7th Cir. 1989)(same), cert. denied, 493 U.S. 1023, 110 S. Ctr. 726 (1990). Similarly, Cemco has no standing to assert that the district court's order of a sixty-day redemption period for Memorial Estates was improper.[10]

Finally, Cemco contends that the bankruptcy court lacked jurisdiction to impose a $1,000 fine against its attorney. The bankruptcy court sanctioned the attorney pursuant to Bankruptcy Rule 9011 and 28 U.S.C. sec. 1927 because he filed a motion to vacate the bankruptcy court's issuance of deeds of burial plots to FDIC customers which reiterated the same jurisdictional argument he had made in numerous other pleadings.

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[10] In addition, Cemco has no standing to argue that the district court had no jurisdiction to enter a deficiency judgment, to order a turnover of funds, or to grant receiver's fees and expenses after the expiration of the redemption period because those awards do not affect Cemco.

Although we upheld a bankruptcy court's imposition of a sanction under Section 1927, in In re TCI Ltd., 769 F. 2d 441 (7th Cir. 1985), we did not discuss the court's jurisdiction to impose the sanction. [11] Without addressing Cemco's argument that the bankruptcy court is not a "court of the United States, " which the district court found persuasive (relying on 28 U.S. C., sec. 451 and In re Arkansas Communities, Inc., 827 F. 2d 1219 (8th Cir. 1987)), we agree with the district court's determination that the bankruptcy court had jurisdiction to sanction Cemco's attorney under Bankruptcy Rule 9011. See Schweiker v. Hogan, 457 U.S. 559, 585 n. 24, 102 S. Ct. 2597, 2607 n. 24 (1982) (appellate court may affirm district court judgment on any basis having support in the record), cert. denied, 478 U.S. 1007, 106 S. Ct. 3301 (1986); Martinez v. United Auto., etc. Local 1373, 772 F. 2d 348, 353 (7th Cir. 1985).

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[11] 28 U.S.C., sec. 1927 provides:

> Any attorney or other person admitted to conduct cases in an court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonable and vexatiously may be required by the court to satisfy personally such excess costs. (Emphasis added).

Bankruptcy Rule 9011 provides that a bankruptcy court may sanction misconduct relating to signed papers filed in "a case under the [Bankruptcy] Code." The sanctions may include an order to pay the other party reasonable expenses incurred because of the filing, including a reasonable attorney's fee.

Cemco argues that the sanction arose in a "related" proceeding (in which the FDIC invoked the bankruptcy court's jurisdiction by motion to issue deeds to purchasers of burial plots) and therefore the bankruptcy court was authorized only to recommend the sanction to the district court and could not enter a final order. See 28 U.S.C., sec. 15 7(c)(1). Cemco also contends that the sanction is unreasonable and not related to any expenses.

The district court found that Cemco's attorney filed the motion at issue in Memorial Estates' bankruptcy case, a "case under the code," and that the sanction itself was a "core" proceeding in which the bankruptcy court could enter a final order pursuant to

Section 157(b(1) and (2). The court noted that the attorney's conduct "concern[ed] the administration of the estate" and "affect[ed] the liquidation of the assets of the estate" in violation of Section 157(b)(2)(A) and (o). We agree with the district court's reasoning. In any event, the district court considered the merits of the sanction and found it reasonable and proper. We agree with that determination

Cemco's other arguments are without merit and warrant no discussion.[12]

The judgments of the district court are AFFIRMED.

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[12] Cemco also contends that the issuance of deeds for burial plots to FDIC customers was improper. However, Cemco concedes that it "has no reason to complain if it does not own the burial rights. " Because we found the latter issue moot, we will not address the propriety of the issuance of deeds to FDIC customers.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:) No. 85 C 3520
MEMORIAL ESTATES, INC.,) No. 85 C 8786
Debtor.) No. 86 C 7780
) No. 87 C 3829
CHICAGO BANK OF COMMERCE,)
Plaintiff,) No. 83 B 1016
v.) No. 83 A 1119
AMALGAMATED TRUST AND)
SAVINGS BANK, ET AL.,) Judge John A.
Defendants.) Nordberg

MEMORANDUM OPINION AND ORDER

A bank holds a mortgage on a cemetery. The cemetery fails to make the mortgage payments and attempts to sell most of its assets, including "unused burial spaces," to a third party. The third party operates the cemetery, sells "unused burial spaces," and keeps the proceeds, claiming that the "unused burial spaces" are not covered by the bank's mortgage. The bank then brings an action in state court to foreclose on the cemetery. One can imagine a host of ghostly legal issues, but none arises in this case.

The central issue is whether the bank's mortgage covers the cemetery's "unused burial spaces." Soon after the bank brought the foreclosure action, the cemetery filed for bankruptcy, the foreclosure case was removed to federal court, and the third party filed affirmative defenses and counterclaims to the foreclosure action. The bankruptcy court held hearings on the bank's foreclosure action and on the third party's counter claims, and pursuant to 28 U.S.C., sec. 157(c)(1) issued proposed findings of fact and conclusions of law to this Court. The bankruptcy court proposed that the bank's mortgage covered the "unused burial spaces," that the bank was entitled to foreclose its mortgage on the cemetery, and that the third party's counterclaims were without merit. The bankruptcy court also denied the third party's motion to recuse the bankruptcy judge for bias and denied a petition to intervene by a class of owners of mausoleum rights and a class of the cemetery's union employees.

The third party has now filed before this Court a motion to strike the bankruptcy court's proposed findings and conclusions, an appeal of the bankruptcy judge's refusal to recuse himself for bias, and specific objections to the proposed findings and conclusions. As part of the de novo review of the third party's specific objections under section 157(c)(1), this Court has held a hearing during which the parties clarified the record and submitted additional documentary and testimonial evidence. For the following reasons, the Court denies the third party's motion to strike the proposed findings and conclusions, affirms the bankruptcy judge's refusal to recuse himself for bias, grants in part and denies in part the specific objections to the proposed findings and conclusions, and herewith issues its own findings of fact and conclusions of low as follows:

I. Introduction

The banks is the Chicago Bank of Commerce ("Bank"). The cemetery is Memorial Estates, Inc. (Memorial Estates"). The third party is Cemco, Inc. ("Cemco"). On May 17, 1978, the Bank and Memorial estates entered into a lending arrangement, the specific details of which will be set out later in this Court's detailed findings and conclusions. In simplified form, Memorial Estates executed an installment note ("Note") payable to bearer in the amount of $425,000; the Note was secured by a trust deed conveyance ("Trust Deed" or "mortgage"). The mortgage provided that to secure payment of the Note, Memorial

Estates does "grant, remise, release, alien and convey" the cemetery "premises" together with "all improvements, tenements, easements, fixtures and appurtenances thereto belonging. . . ." The Bank is the holder of the Note.

On November 15 , 1981, Memorial Estates attempted to convey to Cemco most of its assets, including "the perpetual use and occupancy for exclusive burial rights" of a section in the cemetery referred to as the Garden of Devotion. The Bank did not approve the conveyance to Cemco, and Cemco did not make any payments under the Note. (The Note, secured by the Bank's mortgage, had been in default since April 2, 1981).

On July 15, 1982, the Bank instituted a foreclosure action in the Circuit Court of Cook County against Memorial Estates, Cemco, and certain others claiming an interest in the cemetery property. Cemco resisted the foreclosure, taking the position that its property interest in the "unused burial spaces" was not real property and therefore was not subject to the Bank's mortgage. Alternatively, Cemco asserted that, if its interest was real property, then the common law provides that Cemco takes the "unused burial spaces" free of the mortgage. The Bank quickly moved for the appointment of an equity receiver to operate the cemetery, sell burial spaces, and retain the proceeds pending the outcome of the foreclosure action. The state court judge concluded that the Bank would be entitled to a receiver under the particular circumstances[13] and announced that he would appoint one. Before the judge appointed the receiver, however, Memorial Estates filed a petition for bankruptcy, and the foreclosure suit was removed to the bankruptcy court as a "related" case pursuant to 28 U.S.C., sec 1452 and 1334.[14]

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[13] A court will ordinarily appoint a receiver in equity at the request of a creditor to prevent a waste of assets that secure the creditor's loan. See In re Memorial Estates, Inc., 797 F. 2d 516, 518 (7th Cir. 1986) (citing 2 Story's Equity Jurisprudence, sec. 1145 (14th ed. Zyon, 1918); Kerr on the Law and Practice

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as to Receivers 26-27 (14th ed. Walton, 1972).

[14] 28 U.S.C., sec 1452 provides in relevant part:

> Removal of claims related to bankruptcy cases
>
> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> Id. (emphasis added).

28 U.S.C., sec. 1334 provides in relevant part:

> Bankruptcy cases and proceedings
>
> ...
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under title 11. Id. (emphasis

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added).

28 U.S.C., sec. 157(a) provides in relevant part:

> *Procedures*
> (a)Each district court may provide that any or all cases under Title 11 and any or all proceedings arising under Title 11 or *related to a case Title 11 shall be referred* to the bankruptcy judges for the district.

Id. (emphasis added).

In general, section 157(a) authorizes the district court to "refer all cases and proceedings within the district court's Section 1334(a) and (b) jurisdiction to the bankruptcy court of the district. Section 157(b)(1) and (c)(1) then confer jurisdiction on the bankruptcy judge in the referred proceedings and define the scope of the bankruptcy judge's authority in various types of the referred bankruptcy proceedings. The bankruptcy court's jurisdiction is entirely derivative through the district court's Section 1334 powers and Section 157(a) reference.

Under Section 157, if a proceeding either (1) arises under" Title 11 case, and (2) is a core proceeding within the meaning of Section 157(b)(2), then Section 157(b)(1) authorizes the bankruptcy judge both to hear and determine it, subject only to ordinary appellate review by the district court pursuant to 28 U.S.C., sec. 158. If, however, the proceeding is not a "core" proceeding but is "otherwise related to" a Title 11 case, then under Section 157 (c)(1) the

Pursuant to his authority under 28 U.S.C. sec. 157(c)(1), the bankruptcy judge held a hearing on the Bank's motion for appointment of an equity receiver. Section 157(c)(1) provides in relevant part:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under Title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after con-

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bankruptcy judge nevertheless may "hear" it but is required to submit proposed findings of fact and conclusions of law to the district court. In such a proceeding, the district judge must enter any final order or judgment after de novo review of any specific and timely objections. If, despite the "related" noncore character of a proceeding, all of the parties consent, then the proceeding may be determined fully by the bankruptcy judge under Section 1 57(c)(2) subject only to ordinary appellate review under Section 158. For a good discusssion of Bankruptcy Court jurisdiction, see 1 Norton Bankruptcy Law and Practice, pt. 4, secs. 5.01-.33 (1987); 1 D. Cowans Bankruptcy Law and Practice, secs. 1-2(1986).

> sidering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> Id. (emphasis added).

After the hearing, the bankruptcy judge determined that an equity receiver should be appointed to operate the cemetery pending the outcome of the foreclosure action and, under section 157(c)(1), proposed to the district court that the equity receiver be appointed. The district court agreed, ordered the appointment of the receiver, and Cemco appealed to the Seventh Circuit.

In In re Memorial Estates, 797 F. 2d 516 (7th Cir. 1986), the Seventh Circuit affirmed the appointment of the equity receiver, stating:

> The appointment was a proper exercise of the district judge's equitable powers if there was a danger that Cemco would dissipate ("waste," in receivership parlance) assets out of which the bank is entitled to collect the money that Memorial Estates owes it. There was

> such a danger. Cemco denies any obligation under the mortgage, and hence claims the right to keep selling off what the bank with much show of reason contends is its collateral, and to retain the proceeds. To prevent dissipation of a security interest is . . . a conventional function for a receiver.
>
> Id. at 521 (emphasis added).

With the appointment of the receiver to operate the cemetery, the case proceeded in bankruptcy court on the Bank's foreclosure action and on Cemco's counterclaims. On July 22, 1985, the bankruptcy judge conducted a trial on the Bank's foreclosure action, and on January 21, 1986, the bankruptcy judge conducted a trial on Cemco's counterclaims. Then on April, 1986, the bankruptcy judge issued a memorandum opinion that indicated he would propose to the district court that the Bank's mortgage covers the "unused burial spaces," the the Bank is entitle to foreclosure, and that Cemco's counterclaims be denied.

(Cemco excludes here that portion of the District Court's Memorandum and Opinion that runs from the second paragraph on page 6 through the first full paragraph on page 35. It is too voluminous to attach and the excluded material does not relate to the issues presented).

IV. Findings and Conclusions

After a de novo review of the bankruptcy court record including the exhibits, and in particular the record of the trial of the Bank's foreclosure, and Cemco's counterclaims, and the evidence submitted during the hearing before this Court, the Court hereby adopts in part the bankruptcy court's proposed findings of fact and conclusions of law and, in addition to the foregoing, makes its own specific findings of fact and conclusions of law, as follows.

A. Jurisdictional Findings

1. The Court has jurisdiction over this foreclosure action pursuant to 28 U.S.C., sec. 1334(b) on the ground that the action is related to a case under Title 11. Under 28 U.S.C., sec. 157(a), the Court properly referred the "related" foreclosure case to the bankruptcy court, and, under section 157(c)(1), the bankruptcy court properly proposed findings and conclusions to this Court. The Court has now given de novo review of those matters contained in the proposed findings and conclusions to which a party has timely and specifically objected.

2. Each of the defendants has been property served by Service of Summons or Publication, and proper notice has been given to each of the defendants during the progress of the foreclosure proceedings. The Court has jurisdiction over all of the defendants to this "related" foreclosure case.

3. As provided by the Illinois Mortgage Foreclosure Law, Ill. Ann. Stat. ch. 110, para. 15-1603 (Smith Hurd Supp. 1988), the period for redeeming the property from a foreclosure sale is "60 days after the date the judgment of foreclosure is entered, if either: . . . (2) the Court finds in the judgment that the mortgaged real estate has been abandoned." Neither the mortgagor nor anyone claiming an interest under it is occupying the mortgaged real estate. The Court therefore finds that the mortgaged real estate has been abandoned and that the redemption period in this case shall expire sixty days from the date of the foreclosure judgment.

B. Evidentiary Findings

4. The Chicago Bank of Commerce ("Bank") filed a complaint to foreclose a trust deed ("mortgage") on cemetery

property know as Memorial Estates, Inc. ("cemetery"). The Bank is the owner of a promissory note ("Note"), made on May 27, 1978, in the original amount of $425,000. This Note was executed by the Amalgamated Trust and Savings Bank ("Amalgamated") as trustee under a Land Trust Agreement dated September 27, 1974, and known as Trust No. 2744. The Note was also executed by the cemetery as co-maker.

The Note was secured by a Trust Deed, also made on May 27, 1978, and executed by Amalgamated as land trustee. The Trust Deed names the Chicago Title and Trust Company as trustee, and the trust Deed was properly recorded in the Office of the Cook County, Illinois Recorder of Deeds on May 18, 1978, as Document No. 24452133. Both the Note and the Trust Deed were identified by the Chicago Title and Trust Company with the number 627426. At the time of execution of the Note and Trust Deed, the cemetery was the sole beneficiary of Amalgamated Land Trust No. 2744. Amalgamated, as land trustee, was and remains the legal owner of the cemetery's real property.

6. The legal description of the real property consigned by the Trust Deed is as follows:

> (the legal description is omitted here for brevity since it is not in dispute and is irrelevant to the issues presented).

7. The Trust Deed provided that, to secure payment of the Note, Amalgamated as land trustee does "grant, remise, release, alien and convey" to the Bank, under the Trust Deed, the cemetery "premises" together with "all improvements, tenements, easements, fixtures and appurtenances thereto belonging." As additional security for the Note, the Bank also holds an assignment of the beneficial interest in

Amalgamated's Trust No. 2744.

8. On November 15, 1981, the cemetery conveyed to Cemco, Inc. ("Cemco") by certificates of title numbers 9847 through 9911, all of its interest in the perpetual use and occupancy for exclusive burial rights "[a]ll spaces of Lot Nos. 3-7-9-23-24 in Garden of Devotion Section No. 1, containing all estates." By separate document, the cemetery assigned the beneficial interest in Trust No. 2733 to First Western Company as agent of Cemco, a corporation which was organized subsequent to the attempted assignment. The Bank has not approved the assignment of the beneficial interest in the land trust as required by the Note and Trust Deed agreement with Amalgamated and the cemetery, and Amalgamated has not accepted the assignment.

9. The cemetery conveyed to Cemco

the cemetery interest in all "unused burial spaces" of Lot Nos 3-7-9-23-24 in Garden of Devotion Section No. 1, containing all estates and the beneficial interest in Trust No. 2744 in exchange for Cemco's agreement to assume, among other things, certain of the cemetery's consumer obligations under the Trust Deed. Cemco agreed to provide no further consideration. Cemco did not obtain a release for Memorial Estates of its Trust Deed obligations, and Cemco never agreed to assume Memorial Estates' Trust Deed obligations.

10. At the time of the conveyance to Cemco, Cemco's president Bernard Savage and Cemco's parent corporation First Western Company knew that the cemetery had previously conveyed the cemetery "premises" together with "all improvements, tenements, easements, fixtures and appurtenances thereto

belonging" by the Trust Deed to secure the Bank's Note in the amount of $425,000.

11. Cemco has not made any payments under the Note, and has taken the position that the "unused burial spaces" are not covered by the Trust Deed and are not security for the Bank's Note. On July 15, 1982, the Bank brought a foreclosure action against Memorial Estates, Cemco, and other defendants on the Trust Deed in the Circuit Court of Cook County. The Note secured by the Trust Deed had been in default since April 2, 1981. At all times pertinent to the foreclosure proceedings, the Bank has been the owner of the Note.

12. The amount of indebtedness under the Note which is secured by the Trust Deed is as follows:

Principal Balance	Interest to 5/16/85
$389,170.71	$265,890.09

Late Charges	Attorney's fees, costs
$48,343.63	(Not Available]

13. Soon after the Bank brought its foreclosure action in the Circuit Court of Cook County, the Bank moved for the appointment of an equity receiver to operated the cemetery pending the foreclosure action. The Circuit Court entered an order on January 19, 1982, stating that the Bank was entitled to an equity receiver, which it intended to appoint on January 24, 1983. Upon entry of this order, the cemetery filed for bankruptcy, and the foreclosure action was properly removed to the federal district court pursuant to 28 U.S.C., sec. 1334 and properly referred to the bankruptcy court pursuant to 28 U.S.C. sec. 157(a). After an evidentiary hearing, the bankruptcy court determined that an equity receiver for the cemetery should be appointed and made that

recommendation to the district court pursuant to 28 U.S.C. sec. 157(c)(1). After a de novo review, the district court agreed, and on January 7, 1985, issued an order appointing the equity receiver to operate the cemetery pending the foreclosure action. The Seventh Circuit affirmed the appointment in In re Memorial Estates, Inc., 797 F. 2d 516 (7th Cir. 1986).

14. The Federal Deposit Insurance Company ("FDIC") has moved for an order directing the equity receiver to issue deeds for burial spaces to certain individual purchasers. On July 26, 1979, the FDIC entered into a Contract Purchase Agreement with the sole shareholder of the cemetery, Howard National Corporation. Pursuant to the Agreement, the FDIC acquired Howard National Corporation's right to receive certain payments due under retail installment contracts

with consumers for the purchase of certain burial rights in burial spaces in the cemetery. Each of the contracts involved a sale of memorials, rights in internment, or other burial rights.

15. The FDIC has submitted to the bankruptcy court an amended list of the consumers who have fully satisfied their payment obligations under the contracts. None of these consumers has received a deed that evidences his or her interest in a cemetery burial space, memorial, or other burial right in the cemetery. The FDIC seeks an Order directing the equity receiver to issue to each consumer a deed that evidences the interest in whatever particular burial right has been purchased and fully paid for.

C. Conclusions

16. The Bank has proved each and every element of its complaint to foreclose its Trust Deed ("mortgage") on the

cemetery property formerly known as the Memorial Estates Cemetery and now known as Fairview Memorial Park.

17. Each of the defendants has been properly served by Service of Summons or Publication, and proper notice has been given to each of the defendants during the progress of the foreclosure proceedings. The defendant, Amalgamated Trust and Savings Bank, as Trustee under Trust Agreement dated September 27, 1974 and known as Trust No 2744, filed its appearance on August 19, 1982, but did not file an answer. An order of default was entered against this defendant on November 9, 1983. The defendants Chicago Title and Trust Company, as trustee under Trust Deed recorded as Document No. 24454133, "Unknown Owners," and non-recorded claimants, have not filed their appearances or answers to the foreclosure complaint. An order of default was en-

tered against these defendants on November 9, 1983.

18. The material allegations in the Bank's Amended Complaint are true substantially as set forth, and the equities in this case are with the Bank. The Bank is entitled to the relief prayed for in its complaint, including foreclosure of the Trust Deed upon the real estate described there in the amount of the total balance due on the Note, as found in Section II, para. 12 of these findings and conclusions. Cemco has not assumed Memorial Estates' Trust Deed obligations, and is not liable for a deficiency or for attorney's fees and costs as provided by the Note and Trust Deed. The Note and Trust Deed provide that reasonable attorney's fees are to be included in the costs secured by the described cemetery real property. Based on the record before this Court, the Court finds that

it is unable to determine the fair, reasonable, and proper attorney's fees and costs to be allowed to the Bank in the foreclosure proceeding. Accordingly, the Court refers this case back to the bankruptcy court for further findings and conclusions as to attorney's fees and costs in connection with the completion of the foreclosure proceedings.

19. Cemco's affirmative defenses present no defense to the Bank's foreclosure action. The Trust Deed held by the Bank securing the Bank's Note covers the "unused burial spaces" that the cemetery attempted to assign to Cemco. The common law allows an individual who purchases a burial space for interment purposes to take title free of the underlying mortgage or trust deed. The common law rule, however, does not apply to a corporate retailer of burial spaces who purchases for profit. Cemco, moreover,

is not a bona fide purchaser of the "unused burial spaces." Cemco had knowledge that the Bank's Trust Deed secured the cemetery "premises" together with "all improvements, tenements, easements, fixtures, and appurtenances thereto belonging."

20. The Bank's Trust Deed is not superior to and does not cover the burial spaces that have been sold to bona fide purchasers for interment or to an eleemosynary or fraternal association solely for resale to its membership.

21. The period of redemption will expire sixty days after the judgment of foreclosure is entered pursuant to Ill. Ann. Stat. ch. 110, para. 15-1603 (Smith-Hurd Supp. 1988).

22. Judgment is entered against Cemco on its Amended Counterclaim Count I claiming the exclusive right to the cemetery's books and records. The

Illinois Cemetery Care Act, Ill. Ann. Stat. ch. 21, par. 64.13 (Smith Hurd 1972 & Supp 1988), requires that the owner of a cemetery keep accurate books and records so as to "enable the [state] to determine whether [the owner] is complying with the provisions of the [Act]." The Court finds that this requirement prevents Cemco from owning the exclusive right to the information contained in the cemetery's books and records and denying the Bank and/or the purchaser at the foreclosure sale access to the informaation. The Court further finds that, in connection with the Trust Deed Agreement, Memorial Estates and the Bank executed a document entitled Assignment of Rents, which gives the Bank a first lien on the cemetery's books and records. Therefore, for this additional reason, the Court enters judgment against Cemco on its Amended Counterclaim Count I.

23. Judgment is entered against Cemco on its Amended Counterclaim Count II seeking compensation for maintaining and operating the cemetery. There is no provision in the Note or Trust Deed that entitles Cemco to compensation for maintaining or operating the cemetery. Cemco had knowledge of the Bank's Trust Deed security interest in the cemetery premises and took possession subject to the Bank's security interest. The Bank opposed the actions of Cemco and has not been unjustly enriched by Cemco's operation of the cemetery.

24. Judgment is entered against Cemco on its Amended Counterclaim Count III seeking to impose an obligation on the bank to assume certain of the cemetery's consumer obligations is denied. Cemco has pointed to no basis for holding the Bank liable for the cemetery's consumer obligations.

25. George R. Shapen has been properly appointed equity receiver of the cemetery pending the foreclosure proceedings. The FDIC has submitted the names of certain of the cemetery's consumers who satisfied all requirements for be-becoming the owner of the burial rights and other rights in the cemetery. Cemco has not put forth any valid reason to prevent these consumers from receiving a deed or other instrument evidencing the consumers' ownership. Therefore, the Court hereby directs the receiver in equity to issue deeds forthwith to the bona fide purchasers of burial rights whose names have been submitted by the FDIC to the bankruptcy court.

ENTER;

JOHN A. NORDBERG
United States District Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:) Case No.
Memorial Estates, Inc.) 83 B 1016
Debtor.)
-------------------------) Adv. No.
Chicago Bank of Commerce,) 83 A 1119
Plaintiff,)
v.)
Amalgamated Trust & Sav-)
ings Bank, et al.)
Defendants.)

(The sole findings and conclusions of the bankruptcy court as to jurisdiction are contained in paragraph 1 of its Proposed Findings and Conclusions of Law, transmitted on August 13, 1986 as follows):

Findings of Fact:

1. The District Court has determined that this Court has jurisdiction over this foreclosure action "pursuant to 28 U.S.C. sec. 157(c)(1) on the grounds that the matter is otherwise related to a case under Title 11." In re Memorial Estates, Inc., Decision on Status No. 85 C 3520, slip op. at 2 (N. D. Ill., July 16, 1986), citing In re Memorial Estates, Inc., No. 85 C 3520, slip op. at 2, 4

(N.D. Ill., May 20, 1985) aff'd No. 85-1196, slip op. (7th Cir. July 31, 1986).

(Note: the following are the portions cited above):

Decision on status, July 16, 1986, at 2 (citing slip. op., 4(May 20,1985):

> This appeal involves a pre-bankruptcy mortgage foreclosure action by Chicago Bank of Commerce [CBC] against Memorial Estates, Inc. The defendant transferred its interests to Cemco, Inc. [Cemco] which took possession of the property and operated it. The Chicago Bank of Commerce sought appointment of a receiver in the State Court, and Judge Albert Porter entered an order which indicated that he was going to appoint a receiver to operate the cemetery in place of Memorial Estates, Inc. Memorial Estates then filed for bankruptcy, the foreclosure action was then removed to the Bankruptcy Court and consolidated with that action.
>
> Bankruptcy Judge Fisher appointed a receiver to operate the property, but the order could not take effect until certified by the District Court. Thereafter, Cemco, Inc. as successor to Memorial Estates filed an emergency motion in this court to withdraw the reference, which motion was denied on May 29, 198. Thereupon, after conducting a de novo review of Judge Fisher's

> order appointing a receiver, this court certified his appointment by order entered January 7, 1985. Cemco has filed a notice of appeal of our order of January 7, 1985 to the Seventh Circuit Court of Appeals....
>
> On July 23, 1984 Cemco filed an emergency motion to withdraw reference of the foreclosure matter to the bankruptcy court. Although this motion was based upon the 1984 amendments to the Bankruptcy Act, they have been effectively decided by our order certifying Judge Fisher's appointment of a receiver on April 3, 1984. We held that the bankruptcy court does have jurisdiction over foreclosure actions pursuant to 28 U.S.C., sec. 157(c)(1) on the grounds that the matter is 'otherwise related to a case under Title 11.'
>
> In re Memorial Estates, No. 85 C 3520, slip op. at 2,4 (May 20, 1985).

The district court stated further in its Decision on Status[15] of July 16, 1986 at pages 2 - 6:

> Cemco filed another motion to withdraw the reference and to abstain and remand this proceeding to the Circuit

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[15] The document referred to is not a decision on status but rather Memorandum Opinion and Order of July 16, 1986.

Court of Cook County in June of 1985. The Bankruptcy Court tried the foreclosure action in July of 1985. The District Court judge who was handling this case retired in the fall of 1985, at which time it was reassigned to this court. On April 11, 1986, prior to any ruling on the motion to withdraw, the Bankruptcy Judge issued an opinion dismissing Counts II and III of Cemco's amended counterclaim, and its remaining defenses to the foreclosure action. Cemco has taken several appeals from the Bankruptcy Court's orders in these proceedings. This opinion addresses only the motion to withdraw reference, abstain and remand, and the motion for relatedness between this case and 85 C 8786.

Withdrawal of Reference

In this motion, Cemco requests this court to withdraw the reference of a foreclosure proceeding, which has already been fully tried in the bankruptcy court, abstain from hearing the case, and remand the case to the Illinois courts, where another foreclosure proceeding would have to be conducted. The court finds that the fact that the trial of the foreclosure action has been completed undermines the propriety, if any, of Cemco's motion to withdraw the reference to the Bankruptcy Court.

28 U.S.C., sec. 157(d) provides in pertinent part:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown....

Under this provision the district court may withdraw the reference to the bankruptcy court only "for cause shown." Although the scope of the statute's "for cause shown" language is not entirely clear, the court finds that Cemco has failed to present sufficient reasons, either legal or equitable, to support its motion to withdraw the reference in this case. In In re DeLorean Motor Co., B.R. 900 (Bkrtcy. E.D. Mich. 1985), the court denied the parties' motions to withdraw the reference, abstain, and remand certain proceedings to state court. On the withdrawal of reference issue, the court held:

> The 'cause shown' test is, to be sure, an amorphous test. It is a chameleon within the legal lexicon whose definition is created by its application. In bankruptcy proceedings regarding the withdrawal of reference, cause shown is a 'term yet to be explored in the context of specific cases.' ...Its use in Sec. 157(d) creates a presumption that Congress intended to have bankruptcy proceedings adjudicated in the bankruptcy court unless rebutted by a contravening policy. The presumption may be overcome only by an overriding interest based on a finding by the Court that the withdrawal of reference is essential to preserve a higher interest than that recognized by Congress and is narrowly tailored to serve that interest. 49 B.R. at 912 (citations omitted)(emphasis in original).

In the present case, the foreclosure proceedings of Memorial Estates' property have already been adjudicated in the bankruptcy court, where Congress intended them to be adjudicated. Accordingly, the court finds that there is no good cause to relitigate the issues already resolved by the Bankruptcy Court. The propriety of those rulings will be determined following the ordinary course for Bankruptcy Appeals set forth in 28 U.S.C. 158.

Cemco's arguments in support of its motion to withdraw reference appear to stem from its firm belief that CBC's foreclosure action must be litigated in state court. This court does not share that belief, however. The District Court has already ruled that the Bankruptcy Court had jurisdiction to try the foreclosure proceeding because it was related to a case under Title 11, and this court will not disturb that finding. Cemco has not shown that the Bankruptcy Court, or this court, must abstain from resolving the issued raised in the underlying foreclosure action.

This case is analogous to the decision in In re Pioneer Development Corp., 47 B.R. 624 (Bkrtcy. N.D. Ill. 1985), where the trustee and a bank filed two separate suits against an individual, seeking to recover ownership of a promissory note assigned to him by the bankrupt. The defendant moved to withdraw the reference, which the District Court denied. 33 B.R. 812 (N.D. Ill. 1983). After the bankruptcy court denied his motion to abstain, the defendant filed a second motion to withdraw the reference, which the District Court also denied. After a trial was conducted, the defendants again motioned the bankruptcy court to abstain.

The court denied the motion, agreeing with the bank that due to the procedural posture of the case, manifest injustice would result if the parties were forced to return to state court and relitigate issues which had already been resolved by the bankruptcy court. 47 B.R. at 626, 628. Following Production Tool, this court rejects Cemco's arguments in favor of abstention, and finds that the same circumstances which led to denial of the abstention motions in Production Tool would also militate against abstaining from this case. Therefore, the court finds that the alleged propriety of abstention in this foreclosure action is not a sufficient reason to withdraw the reference in this case.

In a similar vein. the procedural posture of this case demonstrates that a remand under 29 U.S.C. sec. 1452(b) would be inappropriate in this case. Section

1452(b) provides:

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action or a decision to remand, is not reviewable by appeal or otherwise.

The bankruptcy court in this case denied Cemco's motion to remand the foreclosure case to state court. Section 1452(b) allows a court to remand "on any equitable ground." The court finds that Cemco has not presented any equitable grounds which would support the remand of a case that has already been tried in the bankruptcy court. In Allen County Bank & Trust v. Valvmatic International Corp., 51 B.R. 578, 582 (N.D. Ill. 1985), the court listed eight general factors a court should consider when determining whether an adversary proceeding should be remanded:

1) Duplication of judicial resources;

2) Uneconomical use of judicial resources;

3) Effect of remand on bankrupt estate;
4) Whether the case involves questions of state law better addressed by state courts;
5) Comity considerations;
6) Prejudice to involuntarily removed parties;
7) Lessened possibility of inconsistent results; and
8) Expertise of court where the action originated.

51 B.R. at 582, citing Baren v. Devon Bank, 47 B.R. 39, 42-3 (Bkrtcy N.D. Ill.), aff'd and adopted, 48 B.R. 752 (N.D. Ill. 1984). This court finds that the first two factors, which address the proper allocation of scarce judicial resources, militate against a remand to state court to retry the same issues tried by the bankruptcy court in July of 1985. Retrying this case in state court would cause a waste of judicial resources, with no concomitant benefit aside from allowing Cemco to present its arguments a second time in another forum.

None of the remaining factors weigh heavily in favor of a remand at this late date. Although the case involves novel legal questions, they are not questions that the bankruptcy court is unable to resolve. The bankruptcy courts are familiar with foreclosure procedures, and the mere fact that the bankruptcy court rejected Cemco's arguments against foreclosure does not mean the removal itself prejudiced Cemco or its ability to fully present its arguments to the court. Accordingly the court will not disturb the bankruptcy court's decision not remand the foreclosure action to the Circuit Court of Cook County.

* * * * * * *

Note: The bankruptcy Court's Order denying remand was entered on March 1, 1984 and appears at page 10 of the bankruptcy court docket. There is no formal order or memorandum.

* * * * * * *

United States District Court
Northern District of Illinois
Eastern Division

Memorial Estates v. Cemco, Inc.	JUDGMENT IN A CIVIL CASE
	Case No. 89 C 5833

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court holds that the sanction was itself a core proceeding and is reviewable. This Court affirms the imposition of sanctions by bankruptcy Judge Schwartz. This case is dismissed on the merits.

November 7, 1989 H. Stuart Cunnigham
Clerk

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. MILTON I. SHADUR, JUDGE
November 7, 1989

First of all the two cases before me -- that is 89 C 3719 and 89 C 5833 -- involve a single controlling issue: whether Bankruptcy Judge Schwartz had jurisdiction to impose sanctions as he did under either or both of 28 U.S.C. Section 1927 or Bankruptcy Rule 9011.

Now what has happened, as you know, is that Mr. Truax filed a motion to have three other appeals reassigned here on relatedness grounds. And as I understand the basis for that motion, it's principally that those cases are represented to have that identical issue in common with these two cases that I have. That's right, isn't it, Mr. Truax? That's really the principal reason for the motion for reassignment?

MR. TRUAX: That's the principal reason, Judge. We also think that those items also show certain bias and prejudice on the part of Judge Schwartz that related to the others as well.

THE COURT: Well, but --

MR. TRUAX: That is the principal reason.

THE COURT: Well, thank you. My understanding though (and this is consistent with what Mr. Truax has said) is that they also present some other issues. And at least if I rule against the appellant on the jurisdictional arguments that are made in my case, other questions would remain in -- no, let me turn it around. If I ruled in favor of the appellant on the jurisdictional issues, then all of the cases would get disposed of, because if there is no jurisdiction to do what is complained of here, as I understand it, the same thing would control there.

The difficulty is the one that I pointed out early on-- and that is that there are other questions that would remain in those other cases if I decide that jurisdiction existed. That being true, I find under the circumstances that a reassignment under Rule 2.31(b) is not called for because, at least under the view that I take of the matter, I am in a position to treat with the case that I have in final form, whereas I am not in a corresponding position because I haven't had the merits of those other matters addressed to me. And that being true, the conditions of our General Rule 2.31(b) are not satisfied.

For that reason, what I am going to do is turn to the issues in my case, understanding that the other judges to whom those other cases are assigned may or may not choose to follow my ruling on the common questions of law. That happens all the time, of course, and what I expect will likely be done is that my ruling here -- my oral ruling -- will be written up, and if the other judges choose to follow it they may. If not, that's their determination.

Let me then turn to the substantive matters that are posed to me. First of all, as to Section 1927, as all of you know, our Court of Appeals has at least on one occasion sustained a bankruptcy-originated sanction under that statute. Indeed it was against the self-same lawyer who was sanctioned by Judge Schwartz here -- that is, Mr. Needler. Of course I am referring to In re TCI Limited, 769 F. 2d 441, a 1985 case.

And Mr. Truax, maybe you can confirm for me -- at least from my reading of that one, it reads as though the case that was involved there that ultimately triggered sanctions was a related case, was it not?

MR. TRUAX: Judge I believe that it was a related case. Some type of adversary complaint.

THE COURT: Yes. It was an adversary proceeding, and at least it looks to me as though it was a related case, and an adversary proceeding in one.

Now although Judge Easterbrook in writing the opinion in TCI outlined eight arguments that were made by Mr. Needler on appeal in that case, none of them was the jurisdictional argument that's now advanced. But subject matter jurisdiction always has to be examined -- has to be examined even sua sponte. And there are case in which our Court of Appeals has held that an unexamined exercise of jurisdiction in one case does not foreclose examination of subject matter jurisdiction challenged in a later case, when the issue is brought to or comes to the court's attention. So it seems to me the question of whether there is jurisdiction under 1927 is an open question.

On that score, I do find the argument that's advanced by appellant here -- that is, that a bankruptcy court is not a "court of the United States" within the meaning of Section 1927, because it does not fit that description under 28 U.S.C. Section 451 -- is a persuasive argument. In that respect, I note not only the use of the term "court of the United States" in Section 1927 itself, and also in Section 451 of Title 28, where that term is defined, but also the fact that the Revision Notes to Section 1927 specifically include a cross reference to the Section 451 definition.

In that respect Messrs. Needler and Truax have cited to a Missouri Bankruptcy Court decision, In re Richardson at 52 Bankruptcy Reporter 527, a 1985 case. But more recently the Eighth Circuit has at least suggested its approval of that holding. My reference here is to a case that was not cited to me, but I think it's well known at this point, In re Arkansas Communities, Inc., Brown against Mitchell, that's 827 F.2d 1219 at page 1221, a 1987 case out of the Eight Circuit. It is true that ultimately the Court of Appeals there reserved ruling on the issue, but it certainly referred favorably to the analysis and quoted at some length the analysis, in the Richardson case. And that's at least how the opinion seems to read.

In any case, though, I find it unnecessary to decide whether to follow TCI's unexamined example, as I normally should follow our Court of Appeals, or this Richardson analysis that the Arkansas Communities case referred to. My reason for saying that is that although the appellant here might prevail on that issue, the appellant still loses the case. Just as the Arkansas Communities court affirmed the existence of Bankruptcy Court jurisdiction to impose sanctions on narrower grounds than the District Court there had done, relying on Bankruptcy Rule 9011, so I find Judge Schwartz had jurisdiction under that same Rule.

Let me call your attention to some discussion in the Arkansas Communities case -- I am reading from 827 F. 2d at 1221 and 1222.

> "Although federal courts have upheld a bankruptcy court's imposition of sanctions under 28 U.S.C. Section 1927 without discussion of the bankruptcy court's jurisdiction [citing TCI], we agree with the appellants that it is questionable whether a bankruptcy court falls within the definition of 'courts of the Untied States' for purposed of imposing sanctions against attorneys under this section [Citing Richardson.]
>
> "Nevertheless, this court is not aware of a single case holding that a bankruptcy court does not have jurisdiction under Bankruptcy Rule 9011 to award attorney's fees as sanctions. Like the district court here and the federal district court for the District of Colorado, In re Silver, 46 B.R. 773, we do not believe that Marathon mandates a different result. Furthermore, we believe that to not allow a bankruptcy court to impose attorney's fees as sanctions against those who willfully abuse the judicial process would ignore the realities of present-day litigation and the relationship between the court systems. As best expressed by the court in In re Silver . . . :
>
> > Especially in these days where the number of proceedings in the federal court continues to rise, the Court concludes that sanctions such as

> those imposed in this matter are necessary in order to protect the integrity of the Bankruptcy Code as well as the judicial process."

That's the end of the quote.

"Accordingly, we hold that a bankruptcy court has jurisdiction under Bankruptcy Rule 9011 to assess attorney's fees as sanctions against attorneys who fail to comply with the rule. Our holding is more limited than that of the district court, in that we do not address whether the bankruptcy court similarly has jurisdiction under 28 U.S.C. Section 1927. Nevertheless, after examining the record, we agree with the district court that the appellants' conduct violated Rule 9011, and that the bankruptcy court could have properly assessed attorney's fees under the rule."

And then they cite a case -- a United States Supreme Court case -- for the familiar proposition that an appellate court can affirm a district court judgment on any basis having support in the record.

Now in response to that proposition, what the appellant essentially argues is that this arose in a related case and not in a core proceeding, and therefor doesn't come within Rule 9011. Those are frankly two separate concepts and have to be examined separately, because those are not mutually exclusive categories. They are really categories that deal with nonidentical subjects. As for the fact that the underlying case is a related case, that does not mean that it is not governed by the Rules. That argument really would prove too much, for then related cases would be a game without any rules at all. They would have no anchor at all. There wouldn't be any rules covering their procedures.

Rule 9011, just like Rule 1001, which is the basic rule establishing the Bankruptcy Rules, refers to "any paper filed in a case under the Code." In this situation the "case under the Code" is In re Memorial Estates. If that reading were not correct, for example, the entire set of rules in the 7000 series -- the ones that deal with adversary proceedings, and that in a large part incorporate the Federal Rules of Civil Procedure -- would not apply to the adversary proceeding, which is, after all, one way that a related case gets into the Bankruptcy Court.

Accordingly, I reject flat-out any jurisdictional argument that's based on the argued inapplicability of Rule 9011. And I therefore find that Rule 9011 does in fact confer power on the Court to treat with lawyer conduct that's violative of that Rule in this kind of situation.

Now there is of course one issue that necessarily remains then -- and that is, whether all Judge Schwartz could do would be to make a recommendation for a de novo proceeding under 28 U.S.C. Section 157(c)(1). As you know, that section talks about what bankruptcy courts may do in related cases -- that is a proceeding that is otherwise related to a case under Title 11 although it's not a core proceeding. There isn't any question, of course, that the underlying proceeding (as I have said, a related case) comes under that provision, pursuant to which the bankruptcy judge may submit only proposed findings of fact and proposed conclusions of law, and the case then comes before a district judge de novo.

But that doesn't correlate one to one with the concept that a sanction for obstructionist tactics necessarily falls within that same provision. Instead what I find is that the Rule 9011 determination, just as is true with respect to Rule 11 determinations in the district court there is a kind of independent existence. It is familiar doctrine, for example, that after dismissal of a case in a district court, or after removal of a case from the district court, or after an appeal from final judgment in the district court, the district court nonetheless retains jurisdiction to impose Rule 11 sanctions. Incidentally, one facet of that, as you may know, is now before the Supreme Court.

What's important in that sense is that, viewed independently, the sanction for conduct such as that found by Judge Schwartz here is really itself a core proceeding. Because what he found was that Mr. Needler's tactics had "impeded the administration of the estate itself." If I may borrow a phrase from Section 1927, that talks about lawyers "who multiply proceedings in any case unreasonable and vexatiously." Remember that although Section 1927 is not applicable for the reason that I held, it accurately paraphrases part of the conduct that's sanctionable under Rule 11, and therefore under its counterpart, Rule 9011. Indeed TCI itself teaches that. It say that those two criteria track each other.

So what I hold then is that the sanction here was itself a core proceeding. Take a look, for example, at Section 157(b)(2)(A), "Core proceedings include, but are not limited to --matters concerning the administration of the estate;" or 157(b)(2)(0), other proceedings affecting the liquidation of the assets of the estate." Certainly conduct that threw a major roadblock into the effective disposition and administration of the estate, which is what Judge Schwartz ultimately determined here, falls within either or both of those definitions. Indeed, as you know, 157(b)(2) says, "Core proceedings include, but are not limited to" the particular examples.

And therefore what I hold is that the sanction in this situation was indeed a core proceeding. And therefore pursuant to Section 157(b)(1) it is reviewable under Section 158 effectively as an appeal, and not limited to the de novo review that's provided for related cases.

Now having found that, only the merits of the imposition of sanctions remain. And in all candor, nothing is really offered to suggest that Judge Schwartz' substantive determination was not entirely reasonable and proper. And indeed I do find that it was, and I find there was ample basis for Judge Schwartz to have ruled as he did. And accordingly I affirm the imposition of sanctions by Judge Schwartz in the cases before me. And that means that the appeals in each of these cases are dismissed on the merits.

Now to return to the point of beginning. As you can see, the merits in those other cases had not really been tendered to me. The merits in the other cases are before other Judges. And because my ruling is essentially dispositive in my cases, it seems to me that the things do not fit our Rule 2.31(b), because the cases were really not capable of being disposed of contemporaneously. What I would have had to do would be to hold off, defer my ruling in this one, wait until I got the other cases transferred to me, take a look -- they might present very different issues on the merits, I don't know -- that's really not the purpose for which our reassignment on relatedness grounds is structured as it is. Accordingly, as I said at the beginning, if my colleagues choose to follow the ruling that I have made, that may be dispositive in their cases, but they are not bound to do that.

Now does anybody have any questions about the nature of the ruling that I have made here?

(No response)

THE COURT: Sure.

MR. GRUMLEY: It seems that the Court has made a more in-depth analysis of this than quite frankly many jurists who have reviewed similar aspects of this before. Will the Court opinion be published?

THE COURT: No. What I was saying, you see, at the beginning was that frankly having done this, and having gone through an analysis that really requires tracking through some intricate provisions, my preference, very frankly, would have been to write on this one. It may be, having done the work, that I would reduce the thing to a more structured written and therefore published opinion, because it's an issue that I know arises frequently.

MR. GRIMLY: Frequently.

THE COURT: And you know, it is not too often that you can contribute to much to the corpus juris, but it struck me that this might be one instance of that. However, I honestly can't tell you that I am going to be in a position to do that.

* * * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: MEMORIAL ESTATES, INC. Debtor.	)	Case No. 83 B 1016
CHICAGO BANK OF COMMERCE, Plaintiff, v. AMALGAMATED TRUST & SAVINGS BANK, et al., Defendants.	)	Adv. No. 83 A 1119

MOTION TO RECONSIDER, VACATE, ALTER, AMEND, MODIFY AND EXPUNGE ORDER OF MAY 5, 1989 GRANTING FDIC MOTION TO COMPEL ISSUANCE OF DEEDS.

NOW COMES CEMCO, INC., by and through its attorneys, WILLIAM L. NEEDLER & ASSOCIATES, LTD., and moves this Court to reconsider, vacate, alter, amend, modify and expunge order of May 5, 1989 granting FDIC's Motion to Compel Issuance of Deeds. In support thereof, Cemco states as follows:

1. On May 5, 1989, this Court granted FDIC's motion, at the hearing on Friday, April 28, 1989 when FDIC presented its motion (despite the fact that it has interlined and expunged this finding from the draft order submitted by FDIC). Had this Court permitted response, Cemco would have pointed out that this Court is without jurisdiction to entertain any such motion and hence the order can afford no basis upon which deeds can be issued.

2. In brief, the FDIC believes that because the District Court found that the

receiver could issue deeds to "bona fide consumer purchasers named by the FDIC, [that] the district court has already ruled that Cemco does not have standing to object to the issuance of deeds." FDIC's reasoning is flawed in the following particulars:

a. The district court has remanded for a very specific purpose, namely for findings of fact and conclusions of law supporting the fee request of Chicago Bank of Commerce. The reference on remand is therefore narrow, and the District Court has not given up its jurisdiction regarding all other matters.

b. Moreover, as the Court of Appeals has made very plain, this Court has absolutely no jurisdiction to appoint an equity receiver in a related case, and that such action had to be undertaken by the District Court. It is not possible for the District Court to appoint an equity receiver in a related case and then hand over its jurisdiction of the receivership to the Bankruptcy Court. 28 U.S.C., sec. 1334(d).[1]

c. This Court may not enter an order in a related case without the consent of the parties. Cemco does not give its consent, which would in any event have to obtained in the District Court so that the case could be referred to the Bankruptcy Court for hearing and determination. See 28 U.S.C., sec. 157 (c)(1)(2). Cemco has a perfect right to object to the issuance of these additional deeds in the District Court, since there may well be errors and defects which would prevent their issuance. When FDIC presented its original motion for issuance of deeds in 1986 there were a number of errors which Cemco pointed out, and FDCI corrected some but not all. Additionally, the District Court may desire to rehear the entire matter when it learns that important new evidence has been uncovered sustaining Cemco's position. The reason why FDIC does not apply to the District Court no doubt has its roots in a fear that the District Court on further examination may change its mind and request the Court of Appeals to remand the case for further hearing. Needless to say, the FDIC could not prevent Cemco's objection in the District Court and it is frivolous to imagine that by guile and indirection Cemco could be foreclosed from objection by application to this Court. This Court should not let itself be used in such a fashion, in derogation of the principles of due process and equal protection, especially when the District Court has declared in its Memorandum Opinion of September 1, 1988 at page 15 that Cemco was correct in stating that this Court did not have jurisdiction to issue a final order in a noncore related case (i.e. regarding the issuance of deeds).

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[1] Of course, Cemco denies that the rights belong to Memorial Estates, Inc. or the Chicago Bank of Commerce.

3. Cemco is in the process of preparing motions and briefs in the District Court and the Court of Appeals. Far from attempting to delay this case, every action of Cemco has been calculated to bring it to a fast conclusion, so long as that conclusion is just. This Court will be gratified to learn that at least so far as Chicago Bank of Commerce and Memorial Estates, Inc. were concerned, the burial rights were personal property at the time the mortgage was entered (trust deed) on May 17, 1978. On April 3, 1978, then counsel for Chicago Bank of

Commerce, Alison Barkley of Kirkland & Ellis, wrote a letter of opinion (attached hereto as Exhbiit A) in which the burial rights as personal property are fully discussed. At the time of entering the mortage, the bank was fully aware that a security interest could only be created in the burial rights as personal property and did nothing to obtain such an interest -- for, of course, Memorial Estates, Inc. would not give such security interest since it intended to sell the burial rights. The Kirkland & Ellis opinion and review was found in some old records of Memorial Estates, Inc. located in the attic of one of the cemetery buildings owned and cperated by Cemco, Inc., and were only discovered recently after a rain storm when the rook leaked. Of course, no one would have dreamed that an ordinarily privileged document of this sort would have been supplied to Memorial Estates, Inc. or that it would be located in the attic of one of the buildings in another cemetery. It was Cemco's intention to request the Court of Appeals to remand, if necessary, to the District Court for the purpose of reconsidering this matter -- although in the interest of expedition Cemco would prefer a remand to state court where this matter can be disposed of summarily.

4. There should be no doubt whatsoever in this Court's mind that Eugene Sinclair testified in state court that the Chicago Bank of Commerce had no lien on the burial rights of the cemetery, for that is precisely what Kirkland & Ellis advised was the case. The opinion of Kirkland & Ellis is entirely accurate, and this Court was correct in characterizing burial rights as personal property. This Court erred,

however, in attempting to create a security interest in the burial rights where there was none (a twist of the law instantly perceived by the District Court which could never stand muster on appeal). The District Court's Memorandum Opinion and Order can never stand, however, because it changes cemetery law (the law of cadavers) in a way that would make it very difficult for cemeteries to operate as they have and make the rules they have regarding cemetery lot "ownership". Under no circumstances can lot holders have any "property interest" whatsoever other than that of personal property, for otherwise they have a right to say how their lot will look and how they will use their lot, etc. The District Court's Opinion and Memorandum also rests on the false premise that Chicago Bank of Commerce would never have given the mortgage if it had known it was no getting a lien on the burial rights. The Chicago Bank of Commerce knew perfectly well it was not getting a lien on the burial rights because its counsel advised it so.

5. It was error of this Court not to permit Mr. Savage to testify to establish the judicial admission of Mr. Sinclair in state court that the Bank possessed no lien on the burial rights, for this information was peculiarly in the possession of the Bank and not available to the trustee of Memorial Estates, Inc or Cemco, Inc. This Court will recall that it refused to allow the testimony on the false representation of the Bank's counsel that a transcript of proceedings containing Mr. Sinclair's testimony in state court was lurking in the District Court, and Cemco has requested sanctions against the Bank for this false pleading.

6. Cemco offer this proof to this Court so that it might find it easier to resist the attempts of Chicago Bank of Commerce and Federal Deposit Insurance Corporation to invoke jurisdiction where none exits.

7. This Court will recall that there are no schedules or other notice to creditors in this case regarding either the foreclosure or burial rights, and that the best and fairest course is to defer to the District Court in this matter.

WHEREFORE, CEMCO, INC. requests this Court to reconsider, vacate, alter, amend, modify and expunge its order of May 5, 1989, granting FDIC's Motion to Compel Issuance of Deeds and for the entry of an Order Allowing the Receiver to Issue Deeds.

Respectfully submitted,

William L. Needler.

(The exhibit to the motion is not included as it is not relevant to matters now before this court).

* * * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:)
MEMORIAL ESTATES, INC.) Case No.
Debtor.) 83 B 1016
CHICAGO BANK OF COMMERCE,)
Plaintiff,) Adv. No.
v.) 83 A 1119
)
AMALGAMATED TRUST & SAVINGS BANK, et al.,)
Defendants.)

ORDER

This matter coming on to be heard on May 23, 1989, pursuant to the Motion of Cemco, Inc. to Reconsider, Vacate, Alter, Amend, Modify and Expunge Order of May 5, 1989 Granting FDIC Motion to Compel Issuance of Deeds, all parties having notice, the Court being fully advised of the premises and the Court's review of the docket having revealed that Cemco has made these same arguments regarding this Court's jurisdiction in numerous other pleadings (including but not limited to the pleadings described in numbers 16, 18, 19, 47, and 48 of Appendix B to this Court's Fee Recommendation Pursuant to Bankruptcy Rule 9033);

IT IS HEREBY ORDERED THAT;

1. Cemco's Motion to Reconsider, Vacate, Alter, Amend, Modify and Expunge Order of May 5, 1989 Granting FDIC Motion to Compel Issuance of Deeds is denied.

2. Cemco's Motion to Reconsider, Vacate, Alter, Amend Modify and Expunge Order of May 5, 1989 Granting FDIC Motion to Compel Issuance of Deeds is sanctioned as a frivolous pleading filed for an improper purpose.

3. William L. Needler, Cemco's attorney, is directed to pay the sum of $1,000.00 to the estate, through Norman B. Newman, its Trustee, as sanctions

imposed pursuant to Rule 9011 of the Bankruptcy Rules of Procedure and 28 U.S.C., sec. 1927.

4. Norman B. Newman, the Trustee, is directed to serve copies of this Order on all parties in interest, other than William L. Needler, within five (5) days of receipt.

Dated at Chicago, Illinois this 6th day of June, 1989.

ENTER:

/s/ John D. Schwartz
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT WITH ORAL ARGUMENT

Date: December 30, 1991

BEFORE: Hon. John L. Coffey, CJ
Hon. Daniel A. Manion, CJ
Hon. Michael S. Kanne, CJ

Nos. 88-2939, 89-2803, 89-2879, 89-3586, 89-3601, 89-3665, 90-1053 & 90-1089

IN THE MATTER OF: MEMORIAL ESTATES,

INCORPORATED, Debtor

APPEALS OF: CEMCO, INCORPORATED, WILLIAM L. NEEDLER, WILLIAM L. NEEDLER & ASSOCIATES, LTD. and JAMES C. TRUAX, Attorneys.[1]

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division Nos 85 C 3520, 85 C 8786, 86 C 7780, 87 C 3829, 89 C 3719 & 89 C 5833.
Judge John A. Nordberg
Judge Milton I. Shadur

These causes were heard on the record from the above mentioned district court and were argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court in these causes appealed from to be, and the same are hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 23, 1992

Before
Hon. JOHN L. COFFEY, CJ
Hon. DANIEL A. MANION, CJ
Hon. MICHAEL S. KANNE, CJ

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[1] Neither William L Needler & Associates, Ltd. nor James C. Truax were parties in the case, and their names, on motion, were subsequently dropped from the caption.

IN THE MATTER OF:)
MEMORIAL ESTATES, INC.,) Appeals from
DEBTOR.) the United
) States Dis-
APPEAL OF: CEMCO, INCOR-) trict Court
ATED, WILLIAM L. NEED-) for the Nor-
LER, et al.) thern District
) of Illinois,
Nos. 89-2939, 89-2803,) Eastern Div-
89-2879, 89-3586,) ision.
89-3601, 89-3665,) Nos. 85 C 3520
90-1053 and 90-1089) 85 C 8786, 86
) C 7780, 87 C
) 3829, 89 C
) 3719 &89 C
) 5833.
) John A. Nord-
) berg, Judge
) Milton I.
) Shadur, Judge

ORDER

On consideration of the petition for rehearing en banc filed in the above-entitled cause, all of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc.[1]
Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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[1] Circuit Judge Walter J. Cummings did not participate ion the suggestion for rehearing en banc.

STATUTORY APPENDIX

EMERGENCY RULE

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

By direction of the full Court met in Executive Session on Thursday, 16 December 1982, the following is adopted as a Rule of this Court

A. RESOLUTION

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co., ___U.S.___, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of this district court find that exceptional circumstances exist. These circumstances include: (1) the unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public law 95-599, (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

B. FILING OF BANKRUPTCY PAPERS

The Court of Bankruptcy constituted by sec. 404 of Public Law 9-598 shall continue to be known as the Untied States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, excepting a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

C. REFERENCE TO BANKRUPTCY JUDGES

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may

exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

D. POWERS OF BANKRUPTCY JUDGES

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those case and proceedings except that the bankruptcy judges may not conduct:

(a) a proceeding to enjoin a court;

(b) a proceeding to punish a criminal contempt --

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(c) an appeal from a judgment, order, decree or decision of a United States bankruptcy judge; or

(d) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (D)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the

Clerk of the Bankruptcy Court unless stayed by the bankruptcy judge or a district judge.

E. DISTRICT COURT REVIEW

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry to the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (E)(2)(a) and (b) of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to to appeals of bankruptcy judge's judgments and orders and the procedures set forth in Bankruptcy interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeals is governed by Rule 802 of the Bankruptcy Rules.

(2) (a) A district judge shall review:

(i) an order or judgment entered under paragraph (D) (2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (D)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (D)(3) whether or not any notice of appeal or application for leave to appeal has been filed.

(b) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order of judgement of the bankruptcy judge and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances required immediate review by a district judge of any matter subject to review under paragraph (E) (2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

F. LOCAL RULES

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

G. BANKRUPTCY RULES AND TITLE IV OF PUBLIC LAW 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C., sec.2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Pine Co., ___US.___, 102 S. Ct. 2858 (1982).

H. EFFECTIVE DATE AND PENDING CASES

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

ENTER:

FOR THE COURT

/S/ Frank j McGarr
Chief Judge

Dated at Chicago, Illinois, this 20th day of December, 1982.

* * * * *

28 U.S.C., sec. 157 **Procedures**

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimations of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a

proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceedings, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (i) of this subsection, the district court, with the consent of all the parties to a proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the Untied States regulating organizations or activities affecting interstate commerce.

Added Pub. L. 98-353, Title I, sec. 104(a), July 10, 1984, 98 Stat. 340, and amended Pub. L. 99-554, Title I, secs. 143, 144(b), Oct. 27, 1986, 100 Stat. __

* * * * *

28 U.S.C., sec. 1334. **Bankruptcy cases and proceedings**

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title

11 or arising in or related to a case under title 11.

(20 Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing a proceeding if an action is commenced and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applied to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

June 25, 1948, c. 646, 62 Stat. 931; July 10, 1984, Pub. L. 98-353, Title I, sec. 101(a), 98 Stat. 333; Pub.L. 99-554, Title I, sec 144(e), Oct. 27, 1986, 100 Stat.____

* * * * *

Sec. 1471. **Jurisdiction**

(a) Except as provided in subsection (b) of this section, the district courts shall have original and, exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located of the debtor, as of the commencement of such case.

* * * * * *

28 U.S.C., sec. 1478. **Removal**

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United

States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

* * * * *

28 U.S.C., sec. 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court, or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise.

Added Pub. L. 98-353, Title I, sec. 103(a), July 10, 1984, 98 Stat. 335.

ADDENDUM

(Two orders erroneously omitted from Orders Section)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 26, 1990

Hon. RICHARD D. CUDAHY,
Circuit Judge

Nos. 88-2929, 89-2803,)Appeals from the
89-2879, 89-3586,) United States
89-3601, 89-3665,) District Court
90-1053, 90-089.) for the Northern
) District of Ill-
IN THE MATTER OF:) inois, Eastern
MEMORIAL ESTATES, INC.) Division:
Debtor.) Nos. 85 C 3520,
) 85 C 8768, 86 C
APPEALS OF:) 7780, 87 C 3829,
CEMCO, INC., WIL-) 89 C 3719, 89 C
LIAM L. NEEDLER, WILL-) 5833.
LIAM L. NEEDLER & AS-)
SOCIATES, LTD., and)Judge John A.
JAMES C. TRUAX, Attor-) Nordberg
neys.)Judge Milton I.
) Shadur.

This matter comes before the court for its consideration of the following documents:

1. "APPELLEE'S MOTION TO DISMISS CONSOLIDATE APPEAL, etc.", filed herein on June, 1990, by counsel.

2. "MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION TO DISMISS CONSOLIDATED APPEAL, etc.", filed herein on June 29, 1990, by counsel.

3. "RESPONSE TO APPELLEE'S MOTION TO DISMISS CONSOLIDATED APPEAL," etc., filed herein on July 6, 1990 by counsel.

4. "APPELLEE'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS CONSOLIDATED APPEALS, etc.", filed herein on July 17, 1990, by counsel.

5. "MOTION TO STRIKE PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS CONSOLIDATED APPEALS, etc."

6. "MOTION FOR DISCOVERY" filed herein on July 6, by counsel for the appellants.

7. "MOTION FOR EXTENSION OF TIME TO FURTHER RESPOND AND TO SUBMIT MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS CONSOLIDATED APPEALS" filed herein on July 6, 1990, by counsel for the appellants.

8. "MOTION FOR LEAVE TO FILE AMENDMENT TO MOTION FOR DISCOVERY, FOR PURPOSE OF ATTACHING AFFIDAVIT AND FOR OTHER RELIEF" filed herein on July 25, 1990, by counsel for the appellants.

On consideration thereof,

IT IS ORDERED that the above listed motions, numbers 5 through 8, are DENIED.

IT IS FURTHER ORDERED that the issue of mootness will be considered by the panel assigned to hear the merits of this appeal. The appellees are directed to include in their responsive brief any argument they wish this court to consider in connection with the mootness issue without reference to any collateral documents. Thereafter, appellants must address those arguments within the confines of its reply brief. . . .

* * * * * *

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 27, 1985

By the Court:

IN THE MATTER OF) Appeals from the
MEMORIAL ESTATES,) Untied States Dis-
INC., Debtor.) trict Court for the
) Northern District of
No. 84-2064) Illinois, Eastern
) Division,
APPEAL OF:) No 83 B 1016
CEMCO, INC.) Hon. Thomas R. McMil-
) len, Judge.
------------------)
IN THE MATTER OF:)
MEMORIAL ESTATES,)
INC., Debtor.)
)
No. 85-1196)
)
APPEAL OF)
CEMCO, INC.)

ORDER

On consideration of the "MOTION TO AMEND ORDER OF FEBRUARY 20, 1985 AND TO GIVE NOTICE TO THE ATTORNEY GENERAL OF THE UNITED STATES" and "MOTION TO EXTEND TIME FOR FILING APPELLANT'S BRIEF AND APPENDIX" filed by appellant on March 15, 1985,

IT IS ORDERED that the February 20, 1985 order consolidating these appeals is VACATED.

IT IS FURTHER ORDERED that the "MOTION FOR EXTENSION OF TIME" in 85-1196 is granted. Appellant's brief will be due on or before April 1, 1985.

IT IS FURTHER ORDERED that briefing in 84-2064 shall be HELD IN ABEYANCE pending further order of this court. Counsel for appellant is directed to file a STATUS REPORT within 10 days of the district court's ruling or on May 1, 1985, whichever date occurs earlier.

IT IS ALSO FURTHER ORDERED that the Clerk of the Court shall, in accordance with 28 U.S.C., sec. 2403, certify to the Attorney General of the United States that appellant in 84-2064 challenges the constitutionality of 28 U.S.C., sec. 1478.

* * * * * * *